83-307

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1983

KETCHIKAN PULP COMPANY,
Petitioner,

vs.

REID BROTHERS LOGGING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether pricing or bidding can be found to be predatory rather than competitive based solely on subjective evidence of intent without any objective analysis whatsoever of a defendant's costs.

2. Whether antitrust injury can be caused by a better-than-competitive price, based solely on subsequent unforeseeable increases in end-product values unrelated to the alleged antitrust misconduct.

3. Whether the courts below erred in finding defendants liable under the antitrust laws based on evidence of alleged conduct well outside the four year statute of limitations period.

STATEMENT REQUIRED BY RULE 28.1

Petitioner Ketchikan Pulp Company was a defendant and appellant below on the issues presented for review.

Louisiana-Pacific Corporation is the parent corporation of Ketchikan Pulp Company.

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**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Ketchikan Pulp Company petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on March 1, 1983.

OPINIONS BELOW

The opinions of the divided panel below are reported at 699 F.2d 1292 and are reprinted as Appendix A. The opinion of the district court is not officially published, but is unofficially reported at 1981-2 Trade Cas. (CCH) ¶ 64,228 and is reprinted as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1983. A timely petition for rehearing with suggestion for rehearing in banc was denied by order of May 23, 1983, and the order is reprinted as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the district court was based on 28 U.S.C. § 1337(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This suit involves application of the federal antitrust laws, specifically, Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 and Sections 4 and 4b of the Clayton Act, 15 U.S.C. §§ 15 and 15b. The suit also involves the Seventh Amendment to the United States Constitution and Rules 38(d) and 39(a), Fed. R. Civ. P. These provisions are set forth in Appendix D to this Petition.

STATEMENT OF THE CASE

A. Preliminary Statement

The questions addressed in this petition provide the opportunity for this Court to resolve intercircuit conflicts and to clarify the law on important issues in private anti-

trust litigation, including: (1) whether a purely subjective, non cost-based standard can be used to determine the line between predatory and competitive prices or bids; (2) whether antitrust injury can be caused by a better-than-competitive price offer; and (3) whether liability and damages can be based upon evidence well outside the statute of limitations period.[1] These questions are but a few of the serious errors made by the courts below.

This private antitrust action is directed at the timber industry in Southeast Alaska. Plaintiff Reid Brothers Logging Company ("RBLC") accused defendants Ketchikan Pulp Company ("KPC") and Alaska Lumber and Pulp Company ("ALP"), the only two pulp mills in Southeast Alaska, of conspiracy and monopolization with respect to every aspect of that industry. In an attempt to place some focus on plaintiff's broad claims, defendants sought pre-trial resolution of the many legal issues, including plaintiff's standing, the statute of limitations, the standards for allegedly "predatory bidding," and whether defendants caused RBLC's claimed injury. RBLC was nevertheless permitted to offer at trial its entire smorgasbord of conflicting claims and evidence. The legal issues were never to be resolved. Even Judge Morrell Sharp's early decision rejecting RBLC's attempt to avoid the statute of limitations by pleading fraudulent concealment was to be ignored.

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[1]Pursuant to Sup. Ct. R. 19.4, KPC incorporates the questions presented and arguments made in Alaska Lumber and Pulp Company's Petition for a Writ of Certiorari from the same judgment on the issues of: (1) whether the refusal to try this case to a jury violated the Seventh Amendment to the United States Constitution and Rules 38(d) and 39(a), Fed. R. Civ. P., and (2) whether a finding of a conspiracy in violation of Section 1 of the Sherman Act can be based on evidence of legitimate social and business contacts and evidence of similar but not consciously parallel conduct.

After more than five years of pretrial proceedings, and due to the illness of Judge Sharp, this action was transferred to Judge Barbara Rothstein immediately before trial. Plaintiff RBLC then withdrew its demand for a jury. Defendant ALP refused to consent to RBLC's last-minute withdrawal and KPC refused to consent to the withdrawal unless all parties agreed. The district court nevertheless refused to allow a trial by jury.

Having ruled that defendants had no right to a jury trial, Judge Rothstein tried the case without a jury over a four-month period. After trial, plaintiff submitted proposed findings of fact and conclusions of law arguing a sweeping conspiracy in existence from the moment KPC and ALP began pulp operations in Southeast Alaska in 1959. The proposed findings were adopted *virtually verbatim* from plaintiff's proposals. Despite the extraordinary breadth of plaintiff's allegations and despite thorough briefing of critical legal issues through pretrial, trial and post trial, *the decision in the district court does not cite a single case or otherwise address any of the legal issues presented.*

The Ninth Circuit voted 2-1 to affirm (Judge Tuttle sitting by designation from the Eleventh Circuit and Chief Judge Browning in the majority; Judge Reinhardt dissenting). Many of the legal issues raised on appeal were ignored by the majority. The findings of antitrust violation are replete with legal error and should not have been sustained. Petitioner is left with conclusory findings of antitrust violation, the scope of which is impossible to determine, which provide no guidance to permissible conduct in the industry.[3]

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[3]Those findings are now being used in Congress and by various interest groups to urge action that could force the defendant mills —which provide the only significant basis for year-round employ-

More important, however, the prejudice of the legal errors below could spread far beyond this industry. The questions raised in this petition go to the heart of private enforcement of the antitrust laws. This petition cannot and does not raise all of the issues that require correction; instead, petitioners raise only those few issues that, consistent with this Court's limited certiorari jurisdiction, provide a unique opportunity for this Court to resolve conflicts between the circuits, to avoid uneven enforcement of the antitrust laws, and to assure that the antitrust laws are not enforced in such a way as to contradict their very purposes.

B. Background of the Timber Industry in Southeast Alaska

Ninety-seven percent of the commercial timber in Southeast Alaska is within the Tongass National Forest; it is owned by the federal government and is controlled through statutes and extensive regulations administered by the United States Forest Service. The timber stands in Southeast Alaska are old and over-mature and are for the most part suited only for the production of pulp. From the early 1900's, the Forest Service sought to establish a pulp-based industry in Southeast Alaska in order to utilize, consistent with federal statutes, regulations and policies, the lower quality timber, as well as to promote a stable population and economy in Alaska. The government's early efforts were unsuccessful; no company was willing to make the capital investment necessary to establish and operate a pulp mill because other regions had significant cost advantages.

In recognition of the competitive disadvantages of timber operations in the remote islands of Southeast Alaska, the

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ment in Southeast Alaska—to close down. *See, e.g.*, Tongass National Forest, *Oversight Hearings Before the Subcommittee on Mining, Forest Management and Bonneville Power Administration of the House Committee on Interior and Insular Affairs*, 98th Cong., 1st Sess. (June 29, 1983).

government promulgated regulations known as the "primary manufacture rule" to require that all timber cut on national forest lands in Alaska be manufactured or processed in Alaska. 36 C.F.R. § 221.25(i)(1975). Without the primary manfacture rule, unprocessed logs would more profitably have been exported directly to Japan, and no mill industry in Alaska could have been established.

As a further inducement to establish pulp mills, the Forest Service planned in the 1940's and offered four 50-year timber supply contracts, which guaranteed a timber supply at a cost enabling competition with the Puget Sound area, contingent upon the building and operation of pulp and other mills in Alaska. The Forest Service awarded the first 50-year pulp contract to petitioner KPC in 1951. The contract explicitly recognized the significant risks KPC was undertaking to establish a new and untested industry under unique and isolated conditions. Although enterprises such as Georgia-Pacific Corporation, St. Regis Paper Company, and U.S. Plywood-Champion Paper, Inc., considered various proposals to establish pulp mills in Alaska, only KPC and, in 1959, co-defendant ALP were willing to undertake the costs and risks involved.

The primary manufacture rule compelled a logger who purchased a National Forest timber sale in Alaska to sell the logs suitable only for pulp to KPC or ALP. KPC and ALP thus became the only market for a substantial proportion of the logs cut in Southeast Alaska; to attain this market position, their only act was to build the first and only pulp mills in Southeast Alaska pursuant to their contracts with the federal government. There has never been any claim, evidence or finding to dispute the fact that KPC's and ALP's operation of the only pulp mills in Alaska is the result of actions and policies of the Forest Service, federal statutes and regulations, and natural conditions in Southeast Alaska.

C. Facts Material to Question 1 Regarding the Ninth Circuit's Subjective Standard for Determining "Predatory" Bidding

KPC's long term contract with the government did not contemplate that it could satisfy all of its log supply requirement for its operations from its contract area. The remainder of KPC's supply was to be obtained from the purchase of smaller, shorter term Forest Service timber sales (called "independent" timber sales) or from the purchase of logs from loggers or other sources.[3] Defendants' supplementation of their timber supply through the bidding process took place in the face of a "chronic shortage of timber that persisted throughout that entire period" (App. A at A-4), with the Forest Service "hard pressed to meet the requirements of the mills." App. B at A-47. Thus, the courts below recognized that defendants had a right and need to bid for timber and that the timber was in short supply.

RBLC claimed that the defendant pulp mills submitted "predatory" bids on certain Forest Service timber sales in 1966-67 against "would-be mill entrants." KPC bid on only two timber sales (in 1966 and 1967) against bidders designated by plaintiff and the courts below as "would-be mill entrants."[4] App. B at A-50. No evidence was presented

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[3]The Forest Service provided for oral auctions for the express purpose of allowing the existing mills and logging operators in Southeast Alaska, all of which were dependent on Forest Service timber, the opportunity to meet their competition openly and to bid to protect their timber supply.

[4]ALP was found to have bid "predatorily" against outsiders on four occasions in 1966 and 1967. Plaintiff RBLC also bid successfully against the same "would-be entrants." None of these mills ever brought any complaint against defendants or RBLC. Had any complaint regarding this bidding in 1966-67 been filed by the "would-be entrants" on the date of RBLC's complaint, it would plainly have been barred by the four year statute of limitations. 15 U.S.C. § 15b. RBLC's claim of a derivative injury from conduct directed at the "would-be entrants" is also time-barred. *See* Section III, *infra*.

that KPC bid to a point where it could not profitably process the timber from those sales. To the contrary, KPC showed that it never bid beyond the point where it could profitably process and sell the wood products from those sales at the price it bid, and that the location of these timber sales relative to existing operations made their acquisition important to those continuing operations.

The only evidence presented by plaintiff was from internal KPC documents which showed that KPC wanted to win, i.e., to bid to protect a timber supply on which it was dependent and as to which there was a chronic shortage. The legal issue raised by these facts was simple: How high could a defendant bid for timber before that bid would be considered unlawful and predatory, rather than lawful and competitive? Avoiding any answer to this question, the Ninth Circuit rejected any objective, cost-based analysis of defendants' bidding and instead condemned that bidding based solely on evidence of defendants' subjective intent to prevail.

D. Facts Material to Question 2 Regarding Cause in Fact as an Element of Private Antitrust Actions

Plaintiff RBLC sold logs from timber sales it owned and sold logging services on timber sales owned by others. RBLC sold logs to KPC, ALP, and other mills, and neither KPC nor ALP ever refused to purchase its logs. RBLC's claim of injury does not rest on any allegation of depressed prices paid for its logs or services. Instead, RBLC's entire claim for injury is based on its transfer of ownership of a timber sale, the Muddy River #3 sale, to KPC in 1972. App. A at A-12.

RBLC purchased the Muddy River #3 timber sale in 1972 without competition. As owner of the timber sale, RBLC then solicited a single price offer for all of the logs from the sale, which RBLC would produce in a two-year period. KPC responded with a single price offer for the

entire production of logs, as did another mill. Due to financial problems unrelated to defendants' conduct, RBLC needed several hundred thousand dollars to finance its logging. RBLC asked KPC for financing and KPC agreed to provide it. As security for the financing, RBLC assigned its rights to the Muddy River #3 sale to KPC (which assignment was approved by the Forest Service at RLBC's request) and entered an agreement with KPC to log the sale as a contract logger.

RBLC had claimed that it lost the ownership of the sale because KPC's offering price in 1972 was less than competitive and kept RBLC from obtaining financing from another source. However, the courts below found that KPC's offer in 1972 was in fact *higher* than the competitive 1972 price. How could a better-than-competitive price cause RBLC to give up ownership to a timber sale?

The majority condemned KPC for failing to *offer*[8] to renegotiate the price annually based on increases or decreases in the end-product (pulp) market. App. A at A-14. The majority recognized, however, that whether such a provision would injure or benefit RBLC depended entirely on whether end-product prices later went up or down. The courts below concluded that KPC's better-than-competitive offer *in 1972* injured RBLC as the result of admittedly unforseeable market increases in *1973* and early *1974*, when

[8]It is undisputed that *RBLC never asked KPC* (or anyone else) whether it would renegotiate the price periodically or whether it would buy less than the entire production. The conclusion that KPC caused RBLC antitrust injury by making the type of offer RBLC requested ignores the law that a plaintiff cannot complain about a term it solicited where it never demanded an offer on any other basis. *See, e.g., Cleary v. National Distillers and Chemical Corp.*, 505 F.2d 695, 697 (9th Cir. 1974).

RBLC claimed it would log the sale, which were caused by the Arab oil embargo. But the majority ignores the critical fact that when the offer was made in *1972*, neither KPC, nor RBLC, nor anyone else, knew whether end-product prices would later rise or fall. The majority's conclusion that KPC's better-than-competitive offer caused RBLC antitrust injury effectively eliminates cause in fact as an element of a private antitrust action.

E. Facts Material to Question 3 Regarding the Disregard of the Statute of Limitations

This case was tried and decided as if there were no statute of limitations period in a private antitrust action involving conspiracy allegations. RBLC first sought to toll the statute by alleging fraudulent concealment. Judge Sharp, however, found that these allegations were without basis, and granted summary judgment for defendants on the issue of fraudulent concealment. Thus, the law should have compelled RBLC to proceed on whatever claims it may have had during the four years between March 13, 1971 and March 13, 1975, the date the complaint was filed. 15 U.S.C. § 15b.

RBLC was nevertheless allowed to take unlimited discovery back to 1959, the first year both KPC and ALP operated in Southeast Alaska. Defendants then filed partial summary judgment motions directed at alleged conduct which took place well outside the limitations period (such as the alleged "predatory bidding" against outside mills). The statute of limitations motions were denied as premature, with Judge Sharp reserving until trial a ruling on whether such pre-limitations period conduct could give rise to damages. Judge Rothstein, who took over for Judge Sharp, never addressed the statute of limitations issues at trial, admitting *all* pre-limitations period evidence offered by plaintiff over defendants' objections. Judge Rothstein's

opinion relied upon one example after another of pre-limitations period evidence (adopted verbatim from plaintiff's proposed findings) and drew no distinction between pre- and post-limitations conduct. The elimination of the statute of limitations was completed by the Ninth Circuit's cursory and erroneous treatment of the issue.

REASONS FOR GRANTING THE WRIT

I

A FINDING OF "PREDATORY" BIDDING BASED SOLELY ON EVIDENCE OF SUBJECTIVE INTENT, WITHOUT ANY COST-BASED EVIDENCE OF PREDATION, IS ANTICOMPETITIVE AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

The Ninth Circuit flatly rejected the need to resort to *any* objective cost-based evidence to establish "predatory" bidding or pricing. The majority stated:

> The defendants argue that the district court erred in its finding of predatory bidding since there was no evidence that the high prices paid for standing timber would prevent the defendants from covering their marginal costs on the ultimate sale of the processed timber. This rigid objective test, however, has been rejected by this court as the exclusive means of determining the legality of a particular price or bid, *California [Computer] Products, Inc. v. IBM Corp.*, 613 F.2d 727, 743 (9th Cir. 1979); a more subjective test has been adopted, designed to avoid penalizing an innocent miscalculation and to assure appropriate sanctions against those parties that can accomplish their *evil ends* without violating the rigid criteria of the marginal cost test. *William Inglis et al. v. ITT Continental Baking*, 668 F.2d 1014, 1034 (9th Cir. 1981). Where, as here, there is direct evidence that the defendants aimed to exclude competition in order to enhance their long-term market position, *the blind application of a nu-*

> *merical test would only frustrate the intent of the Sherman Act.*

App. A at A-8 n.5 (emphasis added). The majority refers to "the blind application of a numerical test," but here there was *no* application of a numerical test or of any objective evidence whatsoever. KPC submits that it is the cost-blind conclusion of predation based solely on subjective intent, not a carefully applied cost-based test, that "would frustrate the intent of the Sherman Act."

As the Seventh Circuit recently noted in *MCI Communications Corp. v. AT&T,* 708 F.2d 1081, 1113 (7th Cir. 1983), *petition for cert. filed,* 52 U.S.L.W. 3011 (U.S. July 19, 1983) (No. 83-32) ("*MCI*"), courts have nearly unanimously adopted some form of cost-based standard in deciding questions of predation.[6] The Ninth Circuit cases of *California Computer Products, Inc. v. IBM,* 613 F.2d 727 (9th Cir. 1979) ("*CalComp*") and *Janich Bros. v. American Distilling Co.,* 570 F.2d 848 (9th Cir. 1977), *cert. denied,* 439 U.S. 829 (1978) ("*Janich*"), are cited by the Seventh Circuit as reflections of the Ninth Circuit's adoption of an objective test. *MCI,* 708 F.2d at 1113. The majority in the instant case abandons the objective test of the Ninth and other circuits and returns to such "vague formulations" as its reference to defendants' "evil ends" (App. A at A-8

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[6]*See, e.g., Americana Indus. v. Wometco de Puerto Rico, Inc.,* 556 F.2d 625, 628 (1st Cir. 1977); *Northeastern Tel. v. AT&T,* 651 F.2d 76, 87-88 & n.15 (2d Cir. 1981), *cert. denied,* 455 U.S. 943 (1982); *O. Hommel Co. v. Ferro Corp.,* 659 F.2d 340, 351-353 (3d Cir. 1981), *cert. denied,* 455 U.S. 1017 (1982); *International Air Indus. v. American Excelsior Co.,* 517 F.2d 714, 722-24 (5th Cir. 1975), *cert. denied,* 424 U.S. 943 (1976); *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.,* 615 F.2d 427, 431-432 (7th Cir. 1980); *Superturf, Inc. v. Monsanto Co.,* 660 F.2d 1275, 1281 (8th Cir. 1981); *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.,* 551 F.2d 790, 795-797 (10th Cir.), *cert. denied,* 434 U.S. 879 (1977).

n.5), which other courts have criticized as being an outdated method of antitrust analysis that is of "little predictive or precedential value." *MCI*, 708 F.2d at 1113 n.40.

The Ninth Circuit's adoption of a purely subjective test of predatory bidding in this case thus presents this Court with the opportunity to answer two questions:

(1) Must a finding of predatory bidding or pricing be based on *some* analysis of a defendant's costs?

(2) What should that cost-based test be?

With regard to the second question, this Court might prefer to allow the lower courts further time to refine and reach consensus on which particular cost-based test must be applied. Consideration of the first question, however, is imperative at this time.[7] This case presents this Court with the unique opportunity to ratify that some objective cost-based analysis is necessary to condemn a bid or price as predatory rather than competitive and that purely subjective evidence of an intent to win cannot be the basis of a finding of illegality.

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[7]The number of recent opinions addressing predatory pricing and bidding confirms that this is an important question arising with great frequency in the federal courts. Indeed, commentators have referred to "a virtual explosion in the legal and economic literature dealing with predatory pricing." Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 Cornell L. Rev. 738, 740 (1981). Other petitions for certiorari on related issues of predatory conduct are also pending before this court (*MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3011 (U.S. July 19, 1983) (No. 83-32); *Transamerica Computer Co. v. IBM*, 698 F.2d 1377 (9th Cir. 1983), *petition for cert. filed* (August 1, 1983) (No. 83-171), although these cases do not so clearly present the threshold question in the instant case of whether *some* objective analysis of a defendant's costs is a necessary element of the test of predatory pricing or bidding.

Predatory pricing or bidding is difficult to distinguish from vigorous price or bid competition.[8] The cost of erroneously condemning such competition as predatory is great: it punishes and therefore chills precisely the behavior the antitrust laws are meant to promote. The less reliable and understandable the test to determine when a price or bid crosses the critical line between competitive and predatory, the greater is the chill on competitive behavior.

In order to determine the line between competitive and predatory bidding or pricing, courts have widely accepted aspects of an objective cost-based test first developed in Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,* 88 Harv. L. Rev. 697 (1975). Professors Areeda and Turner suggested that prices above marginal cost, even if below total cost, should not be considered predatory. In the bidding context, if plaintiff failed to show that a defendant bid to the point where the defendant could not recover its marginal costs in the sale of its end product, plaintiff could not prove that the bidding was predatory rather than competitive. Logically, if a defendant could bid to a point where it could still make money on the incremental unit produced, but the competitor could not make money at that level, defendant is the more cost-

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[8]As the Seventh Circuit stated:

> There is *no rational way* to determine whether predatory pricing has occurred without some comparison between the prices charged and a rigorously defined measure of the cost of production. *A subjective test based wholly upon intent is almost incapable of distinguishing between pro- and anti-competitive price cuts by a monopolist.*

MCI, 703 F.2d at 1112 (*citing* Areeda, *Predatory Pricing,* 49 Antitrust L.J. 897, 899 (1980); R. Posner, *Antitrust Law—An Economic Perspective,* 188 (1976)) (emphasis added).

efficient producer and should prevail in the competitive struggle.

The objective, cost-based test thus ties the question of predatory bidding or pricing to considerations of efficiency. Courts applying a cost-based test to allegations of predatory pricing have rejected the idea that a firm, even a monopolist, must maintain "a price 'umbrella' under which less efficient firms could hide from the stresses and storms of competition." *Northeastern Tel. v. AT&T*, 651 F.2d 76, 87 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).[9]

Courts have agreed with Areeda and Turner that pricing at marginal cost is the "competitive and socially optimal result." *Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1281 (8th Cir. 1981); *accord, Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977). "[F]orcing a monopolist to charge a price higher than marginal cost could reduce industry output and waste economic resources. . . ." *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

Courts have also found that the objective marginal cost test offers an easily recognizable line which would provide guidance as to permissible behavior to businessmen, courts and enforcement agencies. *See, e.g., MCI*, 708 F.2d 1113, 1116-17. Moreover, when a price exceeds cost there is no danger that a firm is "subsidizing" its price reductions

[9] *See also Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427, 433 (7th Cir. 1980) (underpricing a rival is "the essence of competition," not predatory pricing); *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 792, 795 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977) (monopolist had no obligation "to raise prices to a noncompetitive level in order to save its smaller, undercapitalized rival"); *Telex Corp. v. IBM*, 510 F.2d 894, 926-28 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

with profits earned in less competitive markets; the fact that prices are above cost means that every sale adds to profits and none needs a subsidy. *Northeastern Tel.*, 651 F.2d at 89; *International Air Indus.*, 517 F.2d at 725.

For the above reasons, the marginal cost test has been adopted or approved in substantial part by the First, Second, Third, Fifth, Seventh, Eighth, and Tenth Circuits. *See* n.6, *supra.* Courts have not uniformly adopted all aspects of the Areeda-Turner analysis and have developed a variety of formulations of the objective cost-based test.[10] These questions regarding refinements in the cost-based test do not arise in the instant case, however, since *no* cost based test was applied to defendants' bidding. Indeed, no evidence of defendants' costs and no evidence of *any* relationship between costs and bidding was ever proffered by plaintiff.

Only the Ninth Circuit in this case and the Sixth Circuit in *Borden, Inc. v. FTC,* 674 F.2d 498 (6th Cir. 1982), *vacated and remanded,* 103 S.Ct. 2115 (1983) ("*Borden*") have rejected an objective test based on a defendant's costs in favor of a test of predation based on subjective evidence. The majority in *Borden* concluded that a defendant's prices can be found predatory on a showing that they are below a *competitor's* average variable costs. *Id.* at

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[10]Most circuits have indicated that prices above average *total* cost are presumptively, if not *per se,* legal. *See, e.g., MCI,* 708 F.2d at 1123 n. 58; *Northeastern Tel.,* 651 F2.d at 86, 88; *International Air Indus.,* 517 F.2d at 723. *But see Transamerica Computer Co. v. IBM Corp.,* 698 F.2d 1377, 1386-88 (9th Cir. 1983), *petition for cert. filed* (August 1, 1983) (No. 83-171). And most circuits treat prices below average variable costs as presumptively illegal. *See, e.g., Northeastern Tel.,* 651 F.2d at 88. With respect to prices above average variable costs but below average total costs, courts have not unanimously accepted the *per se* rule of legality suggested by Professors Areeda and Turner but have instead considered other market factors *in addition to the cost analysis. See, e.g., Chillicothe Sand,* 615 F.2d at 432-33.

515-16. Such a rule would forbid prices well above a *defendant's* average variable costs, if the price did not cover the average variable costs of a *competitor,* however inefficient that competitor might be. The Sixth Circuit in *Borden* also relied heavily on "direct evidence of Borden's general intent" to exclude competitors, which evidence was found in various marketing plans and internal documents. *Id.* at 513-14.

The FTC refused, however, to defend this improper test, and successfully urged this Court to vacate the Sixth Circuit's affirmance and to remand for entry of a settlement order. *See* Brief for the FTC Suggesting Mootness (May 2, 1983), reprinted as Appendix E. The FTC recognized that to base a finding of predation on a *competitor's* costs would indeed create "a price umbrella . . . wholly inconsistent with the concept of price competition the Sherman Act was designed to promote" and that the subjective intent earlier relied upon by the FTC to establish predation in fact "simply reflects a purpose to compete in defense of existing market share . . . wholly consistent with zealous competition." Appendix E at A-78; *see also* Proposed FTC Order Modification, 48 Fed. Reg. 9026 (1983). For the same reasons, the Ninth Circuit's new test should be rejected.

The Ninth Circuit betrays the weakness of its own new rule by its citation of evidence of subjective intent which it uses to affirm the district court's erroneous findings. The majority focuses on the Devil's Club No. 2 timber sale and refers to a KPC letter suggesting that KPC "run [the bidding] up on [Alaska Prince] to the point it will really hurt." App. A. at A-7. But *KPC never even bid* on the Devil's Club No. 2 sale. Thus, the test adopted by the Ninth Circuit not only fails to provide an efficiency-related, cost-based test of *conduct,* but it fails to analyze conduct at all. Instead, it punishes as predatory

the expressed intention to defeat a competitor in an announced timber sale bid, even though the defendant never even bids on the sale![11]

The focus of the district court and the majority, perhaps angered by the tone of the documents, resulted in a common error:

> What juries (*and many judges*) do not understand is that the availability of evidence of improper intent is often a function of luck and of the defendant's legal sophistication, not of the underlying reality. A firm of executives sensitized to antitrust problems will not leave any documentary trail of improper intent; one whose executives lack that sensitivity will often create rich evidence of such intent simply by the clumsy choice of words to describe innocent behavior.

R. Posner, *Antitrust Law—An Economic Perspective,* 189-190 (1976)) (emphasis added). Defendants do not deny that this case is marked by "rich evidence" of competitive intent—but that "rich evidence" is a perfect example of blunt and clumsy verbiage used to describe innocent behavior. There could be no better case to manifest the danger of a strictly subjective intent test.[12]

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[11]The remaining evidence of subjective intent cited by the majority is similarly contrary to what the objective evidence shows actually happened. The subjective evidence relied upon was primarily the writings of Arthur Brooks, KPC's timber manager. Mr. Brooks left KPC in 1969, two years before the limitations period. RBLC's reliance upon Mr. Brooks' subjective intent is particularly ironic since RBLC made over a 40% return on its investment while Mr. Brooks was KPC's manager.

[12]"To one not schooled in the niceties of antitrust litigation," the notion that exposure to treble damages under a "statute designed to foster competition" can be predicated on an expressed desire to prevail in a competitive struggle is "difficult to fathom." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 444 U.S. 1093, 1094 (1980) (Rehnquist, J., dissenting), *denying cert.* to 603 F.2d 263 (2d Cir.

That this Court should address this issue now is demonstrated not only by the inter-circuit conflict, but also by the turnabout and inconsistency within the Ninth Circuit. The Ninth Circuit has moved in the last several years from a strict marginal cost-based test (*see, e.g., Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1358-59 (9th Cir. 1976), *cert. denied,* 429 U.S. 1074 (1977); *Janich,* 570 F.2d at 857-58; *CalComp,* 613 F.2d at 742-43; *Murphy Tugboat Co. v. Crowley,* 658 F.2d 1256, 1259 (9th Cir. 1981), *cert. denied,* 455 U.S. 1018 (1982)); to a variant of that marginal cost test (*see, e.g., William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1033-36 (9th Cir. 1981), *cert. denied,* 103 S. Ct. 57 (1982) ("*Inglis*")); to reliance *solely* on evidence of defendant's subjective intent in this case.[13] The Ninth Circuit has declined to reconcile its own intracircuit conflicts on this issue. Despite vigorous disagreement as to the proper test for predation (*see, e.g., Inglis,* 668 F.2d at 1058-59 (Peck, J., dissenting); *Transamerica Computer Co. v. IBM,* 698 F.2d 1377, 1389-91 (9th Cir. 1983) (Lucas, J., concurring), *petition for cert. filed* (August 1, 1983) (No. 83-171)), in banc review has been consistently denied.

At some point the Ninth Circuit must be brought in line with other circuits and with the pro-competitive purposes of the antitrust laws on this issue. The need for rejection of the subjective intent standard adopted by the court below is immediate because it provides no guidance at all in determining whether conduct will later be held to violate the antitrust laws. KPC and ALP must bid for timber to

1979). When the conclusions of the lower courts are inconsistent with the very purposes of the antitrust laws, "this Court cannot remain wholly above the battle." *Id.* at 1096.

[13]Even the majority in *Inglis* rejected exclusive reliance on subjective evidence, stating that "direct evidence of intent alone can be ambiguous and misleading," and "[d]irect evidence of intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation." 668 F.2d at 1028.

keep their mills operating, but they do not know under what circumstances or to what price they may do so without fear of a treble damage suit. This Court has the opportunity to address and correct the untenable and unfair predatory bidding rule, to resolve the conflict between this rule and the cost-based rules of other circuits, and to assure that Sherman Act enforcement is squared with the purpose of fostering competition.

II

A BETTER-THAN-COMPETITIVE PRICE CANNOT CAUSE ANTITRUST INJURY SOLELY AS A RESULT OF SUBSEQUENT UNFORESEEABLE INCREASES IN END PRODUCT VALUES

RBLC's entire claim of injury rested on its transfer in 1972 of the ownership of a timber sale to KPC. RBLC contended that the critical transfer was caused by an offer by KPC in 1972 to buy the logs at a price alleged to be depressed due to the conspiracy, which prevented RBLC from obtaining financial assistance it needed to retain ownership of the sale. But the district court found that KPC's offer in 1972 was *higher* than the 1972 competitive price. App. A at A-17.

The courts below rationalized their finding that KPC's better-than-competitive offer in 1972 caused RBLC's injury with the novel and erroneous finding that KPC should have offered to renegotiate the price annually based on end product price increases or decreases.[14] Although conclud-

[14]Plaintiff claimed and the district court agreed that defendants *did* negotiate and renegotiate prices based on a loggers' *costs*; such cost-based pricing was deemed illegal. The district court did not find any failure to renegotiate prices based on costs, because KPC unquestionably gave adjustments based on costs—to other loggers as well as *to RBLC on this particular timber sale*. Thus, the only violation of the antitrust laws regarding KPC's 1972 price offer was the absence of an annual renegotiation provision *based on changes in end-product prices*—an unprecedented and unsupportable conclusion.

ing that the absence of such a provision established the fact of damage in 1972 (App. A at A-15), the majority concedes that whether KPC's failure in 1972 to offer to renegotiate the price annually has any adverse impact on RBLC is entirely fortuitous. *Id.* at A-19. The majority states:

> The logger and the mill *may often suffer substantial losses as a result of a falling market* or conditions at the logging site less favorable than anticipated; in other cases, however, market prices may soar or costs may be less than anticipated, and both the mill and the logger will reap an unexpected windfall. Unfortunately for the defendants, it was just such a bonanza that their illegal actions prevented RBLC from enjoying in the rapidly escalating market of 1973-1974.

Id. (emphasis added).

It is clear that the market for wood products rose dramatically after the 1972 price offer (before crashing again in 1974), so that *with hindsight* the district court and the majority could conclude that annual renegotiations based on end-product price changes would have benefitted RBLC. But RBLC was not injured by KPC's offer in 1972; the only "injury" occurred in 1973 and 1974 when and because the market for end product prices soared temporarily due to the Arab oil boycott. Thus, the cause of injury and the *only* thing wrong with the 1972 offer was that the market for end products happened to go up rather than down. The absence of a provision for annual renegotiation based on end product price fluctuations was neutral in 1972; it could not have established the fact of damage.

The majority fails to offer any explanation why, as a matter of law, a two-year contract can be deemed anticompetitive.[15] The new rule that a two-year contract is anticom-

[15]The Ninth Circuit's cursory treatment of this causation issue is revealed by its citation to evidence of some contracts in the Puget Sound area that were negotiated annually. App. A at A-15. But

petitive is devoid of common sense, let alone evidentiary, legal, or economic support.

This Court has noted that even multi-year requirements and output contracts can have legitimate business purposes:

> Requirements contracts . . . may well be of economic advantage to buyers as well as sellers, and thus indirectly of advantage to the consuming public. In the case of the buyer, *they may assure supply, afford protection against rises in price, enable long-term planning on the basis of known costs,* and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand. From the seller's point of view, requirements contracts may make possible the substantial reduction of selling expenses, *give protection against price fluctuations, and —of particular advantage to a newcomer to the field to whom it is important to know what capital expenditures are justified—offer the possibilty of a predictable market.*

Standard Oil Co. v. United States, 337 U.S. 293, 306-07 (1949) (emphasis added). The offer by KPC and condemned by the courts below afforded these advantages. It assured the buyer of a log supply under what the courts below found were conditions of increasingly acute shortage, and protected it against increases in its raw materials costs. Such a contract correspondingly protected the seller against market declines[16] and facilitated capital expendi-

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the evidence did not show that such contracts were renegotiated *based on end product price fluctuations,* and the evidence did show that some Puget Sound loggers actively sought the protection of long-term contracts.

[16]In condemning Standard Oil's use of exclusive supply contracts, the Court specifically pointed out that Standard's agreements did not afford either party the advantages of certainty as to price because gasoline prices were pegged to a posted price that floated

tures by permitting the seller to make investments in equipment with the confidence that the revenue for serving the capital debt would be forthcoming.[17]

Thus, even in an "unrestrained market" a logger might well prefer to protect itself against the possibility of a falling market by having a two-year contract price.[18] According to the majority's new rule, however, KPC cannot now grant such protection to a logger requesting it without committing an antitrust violation and being liable for treble damages if the market later happens to go up. The majority has mandated that only one type of contract is permissible in this industry—a price renegotiated annually based solely on changes in end-product values—without explanation of why other types of contracts (including contracts renegotiated annually based on costs) are anticompetitive. The new rule is adopted without giving consideration to the significant adverse impact the rule will have

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with the market. 337 U.S. at 306 n.9. Here, KPC was condemned for giving RBLC the advantage of certainty and failing to float its price with the end-product market.

[17]Although finding the evidence "very close" the Ninth Circuit concluded that RBLC could have received financing with a contract renegotiated year-to-year based on end product price fluctuations, but could not get financing when it had the protection of a better-than-competitive price without the risk of a falling market. App. A at A-15. The Ninth Circuit has it backwards; RBLC's ability to obtain financing would be facilitated by protection from a falling market.

[18]In the district court, RBLC in fact made both arguments. It claimed that it should have had annual renegotiations on the Muddy River #3 sale, because the market rose; however, it claimed that KPC should have honored a two-year contract price at a different timber sale in 1971, because the market had dropped and a price based on the end-product market was not as good as the two-year contract price. Thus, plaintiff contended that it was entitled to the benefit of a renegotiable price when the end-product prices increased, but that it had to be protected from market price decreases by a long-term price.

on loggers when, as in recent years, end-product prices of timber products are dramatically depressed.

The majority's rule that an act may or may not be found to be the cause of antitrust injury depending entirely on events that will occur after the act takes place is without precedent or justification.[19] The majority below referred to the "repeated holdings of the Supreme Court that a lightened burden of proof is imposed upon a plaintiff seeking to prove antitrust damages once violations of the law have been established," citing this Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). App. A at A-11, A-12 n.10. Whether or not the Ninth Circuit erred in abolishing the distinction between the standards of proving fact and amount of damage,[20] however, even the lighter burden of proof was not met here.

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[19]The new rule that a two-year offer is unlawful and is the cause of antitrust injury *if* the market subsequently goes up also contradicts the long-standing rule that the value of an asset lost as the result of an alleged antitrust violation must be determined as of the time of the loss. *Standard Oil Co. v. Moore*, 251 F.2d 188, 221 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958); *see also Farmington Dowel Products Co. v. Foster Mfg. Co.*, 421 F.2d 61, 81 (1st Cir. 1969); *Tlingit and Haida Indians of Alaska v. United States*, 389 F.2d 778, 790-91 (Ct. Cl. 1968). RBLC allegedly lost the ownership of the timber sale in 1972; whether that loss caused it any injury should be determined as of the time of loss in 1972, not based on subsequent events (such as the unexpected increase in end-product values in 1973-74) that could not have had any impact on the loss of the asset in 1972.

[20]This Court has held that the standard of proof for establishing *fact* of damage is stricter than that for establishing *amount* of damages. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931); *see also J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 704 F.2d 787, 791-92 (5th Cir. 1983) (declining to interpret language in this Court's decision in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) as changing the *Story Parchment* distinction between standard of proving fact and amount of damages).

Moreover, the courts below based their conclusion that RBLC was injured on the prices that would have been paid in 1973 and 1974 under conditions of perfect competition, rather than the price that would have been paid in the absence of the allegedly anticompetitive conduct. The "competitive price theory" relied upon by the district court has been expressly rejected, for reasons consistent with the fundamental antitrust principle that a plaintiff is required to prove that damages were caused by the particular *actionable* conduct of defendants found to have violated the antitrust laws. *See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 297-98 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). Even assuming that KPC's better-than-competitive price in 1972 did cause the loss of the sale, the court's perfectly competitive price in 1973 and 1974, which was primarily based on end-product price increases caused by the Arab oil embargo, does not measure the profits RBLC lost as the result of defendants' allegedly anticompetitive conduct as the law requires.[21] *See also Northeastern Tel.*, 651 F.2d at 95; *In re IBM Peripheral EDP Devices Antitrust Litigation*, 481 F.Supp. 965, 1019-20

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[21]As a result of the failure to proffer evidence of any connection between conduct alleged to be improper and plaintiff's alleged damage, it is impossible to distinguish between the impact of wrongful conduct and the impact of: (1) defendants' natural market power as a result of their unique position as pulp mills; (2) government regulations, statutes and contracts; (3) conduct prior to the statute of limitations period, such as the allegedly predatory bidding in 1966-67; and (4) conduct that is lawful under the proper legal standards, such as defendants' bidding discussed in Section I above. Failure to attribute damages to antitrust misconduct is a serious and recurring problem which can give rise to destructive damage awards unrelated to the misconduct. This issue was recently addressed in a petition for certiorari granted by this Court, though later dismissed, in *In re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981), *cert. granted sub nom., Weyerhauser Co. v. Lyman Lamb Co.*, 457 U.S. 971 (1982), *cert. dismissed*, 51 U.S.L.W. 3903 (U.S. June 21, 1983) (No. 81-1618).

(N.D. Cal. 1979), *aff'd sub nom. Transamerica Computer Co. v. IBM*, 698 F.2d 1377 (9th Cir. 1983), *petition for cert. filed* (August 1, 1983) (No. 83-171); *Van Dyk Research Corp. v. Xerox Corp.*, 478 F.Supp. 1268, 1316 (D.N.J. 1979), *aff'd*, 631 F.2d 251 (3d Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *ILC Peripherals Leasing Corp. v. IBM*, 458 F.Supp. 423, 435-36 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp. v. IBM*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981). No evidence of the relationship between the alleged violations and the "competitive price" was proffered in this case. The conclusion that KPC's offer caused RBLC antitrust injury is legally and factually erroneous.

III

THE COURTS BELOW ERRED IN FINDING INJURY AND DAMAGES BASED UPON EVIDENCE OUTSIDE THE STATUTE OF LIMITATIONS PERIOD

The Ninth Circuit and the district court improperly relied upon a collection of disparate pre-limitations period acts and statements by defendants to find defendants liable. The only conduct within the limitations period identified as causing RBLC injury was the failure of KPC in 1972 to offer to provide for annual renegotiation based on end product price changes. That failure was deemed a violation of the antitrust laws because of the "limited market" faced by RBLC in 1972 due to pre-limitations conduct and because of an "atmosphere" of cooperation between KPC and ALP.[22] App. A at A-25. This combination of pre-limitations period conduct and "atmosphere" effectively reads the statute of limitations out of a conspiracy case.

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[22]This "atmosphere" apparently rendered it unnecessary for RBLC even to ask KPC or ALP for the desired contract term, or thereafter to prove that the absence of that term had any connection whatsoever to the alleged conspiracy.

The dependence upon pre-limitations period evidence to transform otherwise legal conduct into an antitrust violation shows the failure of the courts below to recognize the critical difference between claims of continuing injury from pre-limitations period conduct, on the one hand, and claims of antitrust violative conduct within the limitations period, on the other. In relying upon completed pre-limitations conduct that was alleged to have had a continuing effect into the limitations period, the Ninth Circuit has abandoned controlling decisions of this Court (*e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971)) and has created a conflict with decisions of other courts of appeals. *See Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117, 128 (5th Cir. 1975) ("[A] . . . claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action").

The dilemma created by the Ninth Circuit's approach to the statute of limitations is immediate. If a logger today asks KPC for the protection of a multi-year contract price, and the market for end products happens to go up, the "atmosphere" created by alleged pre-limitations misconduct could still subject KPC to treble damages.

The Ninth Circuit's wide-open reliance on pre-limitation conduct premised on no more than a conclusory finding of an all-encompassing "conspiracy" directly contravenes the language and the strong policy behind the statute of limitations in private antitrust actions. The central purpose behind statutes of limitations generally has always been the avoidance of stale claims and the protection of parties against the prejudice which would result from the disappearance of evidence and the fading of witnesses' memories

over time.[22] *United States v. Oregon Lumber Co.,* 260 U.S. 290, 299-300 (1922) ("The defense of the statute of limitations is not a technical defense, but substantial and meritorious. The great weight of modern authority is to this effect. . . . Such statutes are not only statutes of repose, but they supply the place of evidence lost or impaired by lapse of time by raising a presumption which renders proof unnecessary") (citations omitted); *see also United States v. Marion,* 404 U.S. 307, 322-23 n.14 (1971).

The congressional policy in favor of repose in private antitrust suits appears in the congressional debates and reports with respect to the four-year statute. The Report of the Senate Committee on the Judiciary indicates that, in adopting the four-year limitations period and its statutory tolling provisions (15 U.S.C. § 15(b)), Congress was concerned with the fact that:

> [T]he long duration of [private antitrust] proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts.
>
> * * *
>
> [The Committee] does not believe that the undue prolongation of proceedings is conducive to effective and efficient enforcement of the antitrust laws.

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[22]Mr. Brooks, whose internal documents were so heavily relied upon by RBLC, was in his 70's when he testified to events from decades past. His alleged co-conspirator from ALP, Mr. Charles MacDonald, was too ill to be deposed and was deceased at the time of trial. Many government officials responsible for setting up the industry in Southeast Alaska were also either deceased or too infirm to present testimony to counter the innuendo relied upon by plaintiff. The unfairness is multiplied when one considers that the delay was by RBLC's own choice; as Judge Sharp ruled, RBLC had knowledge of these claims more than four years before filing the complaint.

S. Rep. No. 619, 84th Cong., 1st Sess., *reprinted in* 1955 U.S. Code Cong. & Ad. News, 2328, 2333.

Thus, not only does the Ninth Circuit decision undermine the function of the statute of limitations as a statute of repose, create unfairness to litigants caused by the lapse of time, and leave KPC with the impossible and unfair dilemma of conducting its business with the knowledge that even requested, rational conduct can later be condemned under the taint of pre-limitations period actions, but it also has the potential to overburden the already strained federal courts with meritless claims. An improperly enforced statute of limitations makes it difficult for parties to assess with reasonable certainty their potential risks in litigation, thus making settlement difficult, and creates the corresponding potential for strike suits directed at conduct which should otherwise have been long barred from suit.

The Ninth Circuit's approach conflicts with this Court's prior decisions and decisions in other circuits; this Court should take this opportunity to give direction on this important issue.[23]

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[23]The misconstruction of the statute of limitations is not an isolated phenomenon in private antitrust actions. Confronted with the disregard of the statute of limitations in *Berkey Photo,* Justice Rehnquist, dissenting from denial of certiorari, noted:

> I likewise think that the conclusion of the Court of Appeals that significant parts of a defendant's conduct which take place before the statute of limitations period may nonetheless be introduced in evidence is open to serious question under our prior cases.

444 U.S. at 1095. If the admissibility of pre-limitations conduct is suspect and deserving of this Court's attention, surely the unlimited and indiscriminate reliance on such evidence in this case stretching back some 16 *years* before the lawsuit was filed, must be addresseed and condemned.

CONCLUSION

Beyond its unfair impact on the litigants, the decisions in the courts below give no rational guidance for ongoing conduct in an industry vital to the economy of Southeast Alaska. The new rules devised by the Ninth Circuit create inter- and intra-circuit conflicts on the important issues of predatory pricing, the fact of damage, the statute of limitations, the standards for inferring a conspiracy and the right to a jury trial. The Court should take this opportunity to change the aberrant course the Ninth Circuit is taking on these important issues.

Respectfully submitted,

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83 307

No.

In the Supreme Court

OF THE

United States

October Term 1983

Ketchikan Pulp Company,
Petitioner,

vs.

Reid Brothers Logging Company,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Appendix A

Reid Brothers Logging Company,
an Alaska corporation,
Plaintiff-Appellee,

vs.

Ketchikan Pulp Company, a Washington
corporation, and Alaska Lumber and
Pulp Company, an Alaska corporation,
Defendants-Appellants.

Nos. 81-3444, 81-3448.

United States Court of Appeals,
Ninth Circuit.

Submitted Sept. 9, 1982.

Decided March 1, 1983.

Appeal from the United States District Court for the Western District of Washington.

Before BROWNING, TUTTLE,* and REINHARDT, Circuit Judges.

TUTTLE, Circuit Judge:

The defendants-appellants, Ketchikan Pulp Company ("KPC") and Alaska Lumber and Pulp Company ("ALP") come before this Court alleging errors by the district court in finding a conspiracy between the defendants in violation of §§ 1 and 2 of the Sherman Act. 15 U.S.C.A. §§ 1, 2. The appellants also challenge the district court's award of damages to the plaintiff-appellee, Reid Brothers Logging Company ("RBLC"). After a careful review of the extensive record, we find that the district court's holdings are substantially supported by the evidence.

I. THE CONSPIRACY

A. *Background*

The alleged conspiracy aimed its tentacles at the timberland of the Tongass National Forest in southeast Alaska.[1] These woodlands, like many national forests, may be logged by private enterprises under contract from the United States Forest Service ("USFS"). The areas eligible for such harvesting, known as "sales," are advertised in advance by the USFS. A minimum bid is fixed by the USFS, and sealed bids are submitted. All bids are on the basis of a certain number of dollars per thousand board feet (MBF). Parties submitting qualifying sealed bids commonly engage in oral auctions; the high bidder receives the so-called "stumpage rights" to log sales subject to USFS regulations.

KPC and ALP established operations in Alaska in the 1950's. As part of a program to promote the development of the Alaskan timber industry, the USFS entered into long-term contracts allotting specific logging areas to each defendant for a fifty-year period. This guarantee of a long-term timber supply was necessary to offset the risks of establishing processing facilities such as pulp plants and sawmills in an untested market.[2] It was not anticipated that these allotments would satisfy all of the defendants' needs,

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[1]Ninety-seven percent of all woodland in southeast Alaska is within the Tongass National Forest.

[2]USFS policy in the 1950's and 1960's actively promoted the development of the Alaskan timber industry as a means of providing employment. The defendants were each required to establish a pulp processing facility as a condition of their long-term allotment contracts. Another manifestation of this USFS policy was a requirement that all Alaskan timber undergo some basic manufacturing process in a sawmill or pulp plant before export. This regulation, known as the primary manufacture rule, made it necessary for all loggers either to own or operate as a supplier to a processing facility.

and KPC and ALP were expected to supplement their timber supply through the normal bidding process.

The district court found three other product markets in the southeast Alaska logging industry besides the sale of standing timber. First, the sale of logs by independent "purchase loggers" who acquire timber rights at USFS sales and sell the harvested logs to mills for processing. Second, the sale of logging services by "contract loggers" who harvest timber under contract to a party owning the stumpage rights. The final product market is the processing of logs by pulp plants and sawmills.

The district court found a broad conspiracy by the defendants to dominate all segments of the southeast Alaska timber industry. The conspiracy was manifested by the defendants' 1) refusal to compete with each other for timber sales offered by the USFS, 2) exclusion and destruction of independent mills which would compete for the limited standing timber and log supply, and 3) elimination of purchase loggers and control of contract loggers through the payment of artificially low prices for timber.

B. *Section 1 of the Sherman Act*[3]

1. *Introduction*

Certain joint conduct by business entities constitutes a *per se* violation of § 1 of the Sherman Act. This category

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[3]Section 1 of the Sherman Act (15 U.S.C.A. § 1) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

of conduct includes price-fixing (*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84 L.Ed. 1129 (1940)) and horizontal territorial division (*United States v. Topco Associates*, 405 U.S. 596, 608, 92 S.Ct. 1126, 1133, 31 L.Ed.2d 515 (1972)). When this type of behavior is proved, a court is blocked from inquiring into the "reasonableness" of the defendants' actions.

Absent a showing of a *per se* violation, a court must apply a rule of reason analysis. Under this test, the elements of a cause of action for an unreasonable restraint of trade in violation of § 1 of the Sherman Act are:

(1) An agreement among two or more persons or distinct business entities;

(2) which is intended to harm or unreasonably restrain competition; and

(3) which actually causes injury to competition.

Ernest W. Hahn, Inc. v. Codding, 615 F.2d 830, 844 (9th Cir.1980); *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 290 9th Cir.1979), *cert. denied* 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 (1980).

We find that the evidence as a whole establishes the existence of a conspiracy between the defendants and that certain acts committed in furtherance of that conspiracy comprised both *per se* and rule of reason violations of § 1 of the Sherman Act.

2. *The refusal to compete*

The refusal of the defendants to compete for timber sales offered by the USFS or logs marketed by independent loggers was part of a general scheme to reduce the costs of timber acquisition and thereby increase the spread between costs to the defendants and the prices received for end products. This refusal to compete continued from 1959-1975 despite a chronic shortage of timber that persisted throughout that entire period.

The illicit relationship between the defendants dates from the earliest years of their joint presence in Alaska. As early as March 6, 1959, shortly after ALP's establishment of a mill in the Tongass National Forest, A.M. Brooks, KPC's timber manager, sent a letter to Archie Byers, his counterpart at ALP, disclosing information on log prices and log purchase agreements. In that letter, Brooks urged Byers to keep the information "strictly confidential."

By 1969, the defendants had created a geographic border dividing the Tongass National Forest into spheres of influence. In an April 7, 1969, letter to Brooks, George A. Schmidbauer, the general manager of the Crawford Division of Georgia-Pacific Corporation, KPC's parent corporation, wrote that KPC should ". . . bid sales out of [the] K.P.C. area where A.L.P. has dropped out of active bidding."

A 1974 KPC memorandum labeled "CONFIDENTIAL" constitutes irrefutable evidence of a geographical market division. In that memo, D.L. Finney, Brooks' successor at KPC, notes that " . . . it would be most beneficial to ALP and ourselves to realign the operations so that KPC had the West Coast." The document discusses the benefits to each defendant of a geographic redistricting and purposes [sic] an "exchange" of certain areas. The memorandum concludes:

> I cannot stress too hard, my feeling about the beenfits (sic) of towing, administration and log transfers and sorting if we can get the best geographical division between ALP and ourselves. It would also strengthen both of us in a competitive position for any outside interest U.S. Ply or whoever) who tries to compete for sales with us at a later date.

This division of the market, sustained by an uninterrupted pattern of communications up through 1975, resulted in a remarkable record of bidding restraint by the defendants. From 1959-1975, ALP and KPC, the two giants of the

southeast Alaska lumber industry, bid against each other only three times out of 143 sales by the USFS.[4]

3. *The elimination and exclusion of competing mills*

The defendants' conspiracy extended beyond the refusal to compete between themselves. The evidence clearly shows a well-orchestrated and successful effort by KPC and ALP to eliminate existing independent mills and prevent the establishment of new operations through control of the timber supply. By frustrating the efforts of potential entrants into the market, the defendants were able to minimize competition and keep stumpage rates and payments to purchase loggers at artificially depressed levels.

The fate of the Alaska Prince mill provides a well-documented example of the defendants' tactics. After failing in his efforts to prevent the Oji Paper Company of

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[4]The defendants' attempts to refute these numbers only lend further support to the district court's findings. The defendants present evidence that they bid against each other five times from 1959-1975. Three of the sales, Shrubby Island, Bear Creek No. 1, and North Trout Creek, were those sales cited by the district court. These sales all occurred in 1970, and this brief flurry of competition between KPC and ALP was found to be the result of a temporary disagreement between the defendants. The fourth allegedly competitive bid, the East Bradfield sale on May 13, 1975, occurred after the filing of the complaint in this action. Finally, at the fifth sale, Douglas Bay and Mitchell Point in 1974, each defendant refused to bid above the USFS minimum and the award of the sale was decided by a coin flip. There is substantial evidence that this particular refusal to bid was an act in furtherance of the conspiracy. In any case, competition between the defendants on five bids over a 16 year period can hardly refute the overwhelming evidence of wrongdoing in this case.

Defendant's allegations that their failure to compete was the result of natural and geographic factors such as the costs of establishing a camp and towing logs must also fall under the weight of evidence. The documentary evidence shows that ALP and KPC participated in a conscious division of the market and that each defendant refrained from bidding on sales in the other's "area."

Japan from constructing the mill, KPC's Brooks informed Alaska Prince and all independent loggers supplying KPC that loggers wishing to supply Alaska Prince must be prepared to immediately repay in cash all indebtedness to KPC. In a May 27, 1969, letter to Schmidbauer, Brooks noted that Alaska Prince was "desperately in need of timber" and that Alaska Prince was "beginning to cause [KPC] trouble among the so-called independent loggers" by offering higher prices for logs. Brooks' letter discussed the upcoming Devil's Club No. 2 sale and suggested that KPC "run [the bidding] up on [Alaska Prince] to the point it will really hurt." Brooks noted, however, that KPC must beware of ". . . the danger of making one bid too many."

Less than a month after this letter, Alaska Prince capitulated. On June 24, Brooks wrote Schmidbauer that Alaska Prince had agreed to cease offering higher prices to loggers if KPC would provide it with a log supply. But when Alaska Prince failed to outbid Ed Head, another independent mill operator, for the Devil's Club No. 2 sale, KPC retaliated by refusing to sell Alaska Prince any logs.

On July 17, 1969, Schmidbauer wrote Dave Murdey of KPC:

> Don Finney [KPC timber manager] has expressed some concern about bidding all sales regardless of the desirability of the sale and the location in the south Tongass.
>
> As I see the situation, we should bid all sales to keep Ed Head, Alaska Prince Corporation, or Fuji out. If we should decide to let them buy timber on the south Tongass we are going to have to live with them from now on and there is not enough timber for that.

In the fall of 1970, unable to acquire a timber supply, Alaska Prince offered its mill to KPC. KPC acquired the mill in 1971. The district court found that at least five other mills suffered Alaska Prince's fate. The evidence also

supports the district court's finding that the defendant blocked the establishment of competing mill facilities by using covertly controlled corporations ("fronts") to bid preclusively on USFS timber sales.[5]

4. *Payment of artificially low prices for logs*

Finally, the evidence shows that KPC and ALP conspired to pay artificially low prices to loggers. By calculating payments to loggers on the basis of the loggers' costs rather than the value of the logs, ALP and KPC created a network of "captive" loggers heavily indebted to the defendants.[6] With a drop of the executioner's sword, the de-

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[5]The defendants argue that the district court erred in its finding of predatory bidding since there was no evidence that the high prices paid for standing timber would prevent the defendants from covering their marginal costs on the ultimate sale of the processed timber. This rigid objective test, however, has been rejected by this court as the exclusive means of determining the legality of a particular price or bid, *California Products, Inc. v. IBM Corp.*, 613 F.2d 727, 743 (9th Cir. 1979); a more subjective test has been adopted, designed to avoid penalizing an innocent miscalculation and to assure appropriate sanctions against those parties that can accomplish their evil ends without violating the rigid criteria of the marginal cost test. *William Inglis, et al. v. ITT Continental Baking*, 668 F.2d 1014, 1034 (9th Cir. 1981). Where, as here, there is direct evidence that the defendants aimed to exclude competition in order to enhance their long-term market position, the blind application of a numerical test would only frustrate the intent of the Sherman Act.

[6]We note especially the so-called "Minami Report," a survey of ALP timber operations prepared by Fukuchi Minami, the woods manager of the Oji Paper Company in Japan, a shareholder of ALP's parent company. In his 1972 report, Minami noted:

> Operation at logging areas which produces about 70 percent of the whole logging quantity is made nominally by the hands of contractors, but, substantially, they are the so-called "thoroughly owned contractors" of the company subjected even to the guarantee of profits by the same, as a result of which we cannot expect their business efforts as loggers. Such a situation

fendants could cut off a logger's financing, force the logger out of business, and acquire the company or its assets.

The defendants overstate the impact of government regulation on the logging industry. It is beyond question (as recognized by the district court) that the USFS in the 1960's began to discourage certain types of small logging operations. However, the evidence shows that many loggers, including the plaintiff, had both the resources and the experience to survive and prosper in the changing lumber industry. The fact that RBLC was the only remaining independent purchase logger in southeast Alaska in 1973 was found by the district court to be a direct result of the defendants' conspiracy in restraint of prices.

5. *Conclusion*

The evidence shows that the defendants engaged in unlawful anticompetitive conduct pursuant to at least a tacit understanding that each defendant would behave in a particular manner. This finding is supported by both direct and circumstantial evidence. We find that this unlawful agreement constituted a restraint on interstate and foreign commerce in violation of § 1 of the Sherman Act.[7]

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has arisen because the contract price has been and is inappropriate and the deficit owing to this has been covered with growing advance money and, to make matters worse, new contracts for the following year have been made with rent not completely collected. So, we cannot even grasp the ability of the loggers correctly.

[7]The defendants' challenges to the district court's conclusion that a § 1 conspiracy existed are totally without merit. The defendants' attempts to isolate and attack particular portions of the district court's opinion not only ignore the weight of the evidence, but display an apparent inability to interpret certain portions of the district court order. For example, the defendant ALP alleges in its brief that the finding of the § 1 violation was ". . . not based upon any direct evidence of agreement but on an inference of agreement from circumstantial evidence and what the court described as 'consciously interdependent action.' " Yet, that portion of the dis-

C. *Section 2 of the Sherman Act*[9]

The evidence supports the finding of the district court that the defendants violated § 2 of the Sherman Act. Monopoly power is the power to control prices or exclude competition. *United States v. Grinnell Corp.,* 384 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966); *United States v. E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956); and *Greyhound Computer Corp. v. International Business Machines,* 559 F.2d 488, 496 (9th Cir. 1977), *cert. denied* 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978). An illegal monopolization under § 2 consists of: 1) the possession of monopoly power in the relevant market, 2) the unlawful acquisition or maintenance of that power, and 3) causal antitrust injury. *Grinnell Corp.,* 384 U.S. at 570-71, 86 S.Ct. at 1703-04; *Greyhound Computer,* 559 F.2d at 492; *Moore v. Jas. H. Matthews & Co.,* 550 F.2d 1207, 1218 (9th Cir. 1977).

The district court correctly defined the relevant geographic and product markets and found that the defendants combined to possess over a 90 percent share in those markets. The above-cited evidence shows the existence of a conspiracy based on an intent to monopolize and the occurence of several overt acts in furtherance of that conspiracy.

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trict court opinion cited by the defendant reads, "In carrying out their combination and conspiracy, KCP and ALP have operated *both by explicit communications with each other and by consciously interdependent action.*" (Emphasis added). This court does not find it necessary to refute each of the defendant's challenges on an individual basis.

[9]Section 2 of the Sherman Act (15 U.S.C.A. § 2) reads:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars, or by both said punishments in the discretion of the court.

II. THE DAMAGES

A. *Introduction*

The defendants also challenge the district court's finding that the plaintiff, RBLC, was injured as the result of the defendants' unlawful conduct and thus entitled to a treble damages award under § 4 of the Clayton Act, 15 U.S.C.A. §15.[9] To recover under this section, the plaintiff must "establish with some reasonable probability the existence of some causal connection between defendant's wrongful action and some loss of anticipated revenue." *Flintkote Co. v. Lysfjord,* 246 F.2d 368, 392 (9th Cir. 1957); *Inglis,* 668 F.2d at 1051.

The district court's findings of damage to the plaintiff may only be overturned if "clearly erroneous." Fed.R. Civ.P. 52(a). It has long been held that ". . . a finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co., et al,* 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); *United States v. Missouri River Breaks Hunt Club,* 641 F.2d 689, 694 (9th Cir.1981).

Moreover, the clearly erroneous standard as applied in the present case is tempered by the repeated holdings of the Supreme Court that a lightened burden of proof is imposed on a plaintiff seeking to prove antitrust damages once violations of the law have been established. *Zenith*

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[9] 15 U.S.C.A. § 15 provides in relevant part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969)[10] *Eastman Kodak Co. v. Southern Materials, Inc.*, 273 U.S. 359, 377-79, 47 S.Ct. 400, 404-05, 71 L.Ed. 684 (1927); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 811 (9th Cir.1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977).

Despite the long-standing nature of the conspiracy and RBLC's active involvement in the relevant market at all times pertaining thereto, RBLC's claim for damages on this appeal is limited to its loss of revenue at a single logging site, Muddy River No. 3.[11] The damages awarded by the district court rest on the notion that RBLC, in an unrestrained market, could have operated Muddy River No. 3 as an independent purchase logger from 1972-1974. After an exhaustive review of the voluminous record,

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[10]The Court in *Zenith Radio* wrote:

> Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded by a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damages issues in these cases are rarely susceptible of a kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of a more precise proof, the factfinder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damages to the plaintiffs." (Citations omitted).

395 U.S. at 123, 89 S.Ct. at 1576.

[11]In the trial court, the plaintiff also sought damages for losses suffered at the Kah Sheets-Mitchell Point logging sites in 1970. RBLC does not appeal from the court's finding that RBLC could not have operated Kah Sheets-Mitchell Point at a profit in an unrestrained market.

we find adequate support for the district court's findings of fact and therefore reject the contentions of the defendants that these findings are clearly erroneous.

B. *The Undisputed Facts*

In determining whether RBLC was injured by the defendants' conspiracy, it is important to bear in mind the chronology of events at the Muddy River site. RBLC purchased the site at a USFS auction in June 1972. Shortly thereafter, RBLC signed with KPC to deliver the timber from that site to KPC at \$64/MBF.[12] The agreement contained no provision for periodic renegotiation of the contract price. It was anticipated that RBLC would complete its operations at the site within three years.

Throughout 1972, RBLC faced a severe shortage of capital and thus found it necessary to secure financing for "startup costs" at the Muddy River site. Though the district court makes no explicit findings on the amount of funds needed, the evidence appears undisputed that RBLC required at least \$205,000 to finance logging equipment and roadbuilding at Muddy River No. 3 and to pay off previous debtors whose goodwill was necessary for the continuance of operations at Muddy River No. 3.

[12]The parties recognize (and the district court found) that the effective price offered by KPC for the Muddy River No. 3 logs was in fact somewhat higher than \$64/MBF since KPC was to bear additional costs such as towing, rafting, etc. The parties agree that these costs were at least \$9.81/MBF which, when added to the contract price, yields an effective offer of \$73.81/MBF. The parties disagree whether the standard 14 percent allowance for profit and risk authorized by the USFS should be attributed to KPC or RBLC, but, as discussed *infra*, this dispute is largely irrelevant since the effective price in either case exceeds the district court's finding of the unrestrained market price in 1972 for the Muddy River No. 3 logs.

In order to obtain this financing, RBLC executed a "third party agreement" with KPC whereby its ownership of the Muddy River No. 3 stumpage rights was transferred to KPC. After this transaction, RBLC became a contract logger and operated Muddy River in such capacity until September 10, 1973 when it ceased operations at the site.

In 1973 and 1974, there was a sharp rise in the prices of end products exported from Alaska sawmills and pulp plants. In a competitive market, a certain portion of such a price rise would be "passed through" to the owners of the stumpage rights. Therefore, if RBLC had continued to operate Muddy River No. 3 as a purchase logger from 1972-74, it would have reaped substantial profits.

C. *The District Court Findings*

1. *The multi-year, non-negotiable contract*

The finding of the district court that KPC unlawfully imposed a multi-year, nonnegotiable contract on RBLC for the sale of the Muddy River logs is substantially supported by the evidence. By the spring of 1972, competition for logs in southeast Alaska had been effectively eliminated by the defendants' conspiracy. Competing mills (including Alaska Prince, RBLC's principal log buyer in the 1960's and early 1970's) had been either run out of business or enslaved by indebtedness to the point of becoming "captive mills." By the time RBLC purchased the Muddy River No. 3 sale, its choice of customers for its logs was limited to mills controlled directly or indirectly by the defendants.

Furthermore, the evidence also supports the critical finding of the district court that contractual log prices between a purchase logger and a log buyer would have been renegotiated at least annually in an unrestrained market.

Without periodic renegotiation, fluctuations in the market price for logs and their end products would not be "passed through" to the owner of the timber rights. The evidence shows that in the competitive Pacific Northwest timber market, prices are renegotiated on a periodic basis ranging from daily to annually. It was also shown that when the defendants in the present case acted as sellers rather than buyers of logs, prices were renegotiated on at least an annual basis.

Facing these restrictive market conditions, RBLC had no incentive to postpone the execution of the sales contract in hopes of obtaining better terms of sale. Its acceptance of the best terms it could obtain in a restrained market was fully justified.

2. *RBLC's ability to obtain financing*

Once it is determined that KPC unlawfully imposed a flat rate, multi-year logging contract on RBLC, the vital question becomes whether RBLC could have obtained financing to start up the Muddy River No. 3 sale as a purchase logger in an unrestrained market. If RBLC could not have obtained this financing, it would have been forced either to transfer the stumpage rights to a third party and operate as a contract logger, or to delay the commencement of operations for another season in the hope that a rise in prices would make financing feasible; either contingency would require a reconsideration of the district court's damage findings.

The evidence, though very close, shows that RBLC could have obtained sufficient financing to operate as a purchase logger at Muddy River No. 3. The district court found that RBLC could have obtained financing from a combination of the personal assets of Glenn and Martha Reid, the proprietors of RBLC, and $100,000 that would

have been loaned from the Hammer and Wikan Retail Store.

There can be no question but that the Reids' personal assets were available to RBLC as collateral for loans. The history of the business, as with many proprietorships, shows that the Reids treated the debts of the business as their own. We especially note the personal sacrifices made by the Reids to pay off RBLC's debts following the termination of operations at Muddy River.

An accountant testifying on behalf of RBLC established that the net equity of the Reids and RBLC together in March, 1972 was $216,000. Some evidence was presented by the defendants that these assets were already encumbered and could not have served as the basis for further loans, but this testimony was inconclusive.

Art Hammer testified on behalf of Hammer and Wikan Retail Store. Though Hammer testified that he, his father, and Mr. Andrew Wikan would have been willing to make personal loans to RBLC, the district court discounted this testimony and focused on the ability and willingness of the Retail Store to provide financing. Though the defendants attack the competence of Art Hammer to testify regarding the Retail Store's lending policies, the evidence shows that in his position as store manager, shareholder, and board member, Hammer exercised an important voice in such decisions.

Hammer's testimony reflected the enormous respect accorded the Reids for their business acumen and personal integrity. Hammer repeatedly stated that the Retail Store would have loaned the Reids large amounts of money on a mere assertion by Glenn Reid that he was receiving a reasonable price for his logs. Hammer's testimony that he, his father and Wikan would not have requested a financing statement is especially important since RBLC's financial

condition in 1972, even in the hypothetical unrestrained market, would have given an accountant cause for alarm.[13]

The defendants base their argument that RBLC would have been unable to secure sufficient financing to operate Muddy River No. 3 as a purchase logger on the formula derived by the district court to calculate the amount of damages suffered by RBLC at Muddy River. Applying that formula, the district court found that RBLC's costs at the Muddy River site in an unrestrained market in 1972 would have equalled \$71.03/MBF. The formula also shows that RBLCs' revenues in an unrestrained market in 1972 would have equalled \$70.03/MBF.

The defendants compare these figures to the effective price of at least \$73.81/MBF[14] that KPC offered RBLC for its entire Muddy River production and assert (1) that RBLC could not have obtained financing in an unrestrained market when its costs (\$71.03) were greater than its revenues (\$70.03), and (2) if RBLC was in fact unable to obtain financing from a source other than KPC in the actual 1972 market, it certainly could not have obtained financing in the hypothetical unrestrained market where the market value of its logs (\$70.03) was less than the price actually offered by KPC (\$73.81).

The evidence demonstrates that these arguments rely on an inaccurate vision of the operation of a competitive timber market. In an unrestrained market, numerous independent mills bid on timber offered by a purchase logger from a particular sale. Though these bids may on occasion not be high enough to provide a reasonable profit for an

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[13]These dire financial straits of RBLC were primarily the result of the substantial losses suffered by it at the Mitchell Point-Kah Sheets sales in 1970. As previously mentioned, these losses were attributed by the district court to poor logging conditions at the site and were in no way related to the defendants' conduct.

[14]*See* footnote 12, *supra*.

independent logger, the evidence shows that the highest of such bids is routinely accepted since *periodic renegotiation* based on end product prices and the logger's cost assures that an independent logger will obtain the most reasonable price the market can offer within any given time period.

The evidence indisputably shows that the financing of startup costs in an unrestrained market typically comes from the mill that has contracted to purchase the logs from a particular site. Given (1) the chronic shortage of logs that persisted in southeast Alaska, (2) a purchasing mill's anticipation of a profit, and (3) the security provided by the Reids' personal assets and the logs themselves, there can be little question that RBLC could have obtained financing from a mill operator in 1972.[15]

The defendants' arguments improperly separate RBLC's sale of the Muddy River No. 3 logs from the securing of financing for the harvesting of those logs. Their proffered analysis, which assumes the existence of RBLC's three-year, non-negotiable contract with KPC even in an unrestrained market, overlooks that RBLC's most important means of obtaining financing is the collateral provided by the logs themselves. To bind a logging company's production to one party and then speculate how it could obtain financing from another postulates anything but an unrestrained market situation; the defendants seek to rely on the district court's unrestrained market price figures while maintaining the most favorable elements of the market they conspired to create.

Nowhere in its brief do the defendants assert that RBLC could not have found a purchaser for its logs in an unrestrained market. Nor does the evidence indicate that a

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[15]We again take note of the outstanding reputation enjoyed by the Reids. Hammer's testimony established the existence of an outside party which would have loaned up to $100,000 to RBLC on Glenn Reid's word alone.

sawmill or pulp plant facing a chronic shortage of logs in an unrestrained market would not make financing available in anticipation of the profit which induced the mill to purchase the logs initially. The logger and the mill may often suffer substantial losses as a result of a falling market or conditions at the logging site less favorable than anticipated; in other cases, however, market prices may soar or costs may be less than anticipated, and both the mill and the logger will reap an unexpected windfall. Unfortunately for the defendants, it was just such a bonanza that their illegal actions prevented RBLC from enjoying in the rapidly escalating market of 1973-1974.

In sum, the evidence adequately supports the following findings of the district court: 1) in a competitive timber market, prices for the sale of logs from purchase loggers to mills are renegotiated on at least an annual basis; 2) RBLC's agreement to sell the entire production of the Muddy River sale to KPC at a fixed, nonnegotiable price was a product of the conspiracy between ALP and KPC to eliminate competition in the Southeast Alaska timber industry; 3) the nonnegotiable price imposed on KPC by RBLC was far below the true value of the Muddy River logs in an unrestrained market from 1972-74; 4) in an unrestrained market, RBLC could and would have obtained the financing necessary to operate Muddy River No. 3 as a purchase logger from 1972-74; 5) in an unrestrained market where contract prices are periodically renegotiated, a certain portion of a rise in the price of end products produced from harvested logs would be passed through to the owner of the stumpage rights; the absence of any provision for renegotiation in the contract between RBLC and KPC establishes the fact of injury or damages; and 6) the defendents' actions, therefore, deprived RBLC of the substantial profits it could have acquired in the rising market of 1973-74. This proof establishes the amount of damages.

Under these circumstances, we conclude that the trial court correctly refused to let KPC and ALP escape liability for RBLC's substantial losses simply because the non-competitive, nonnegotiable price KPC imposed upon the plaintiff fortuitously hovered near the unrestrained market price calculated by the district court for 1972, the first year of the contract.[16]

3. *The third party agreement and the breach of contract*

The evidence supports the finding of the district court that RBLC would not have signed away its stumpage rights and agreed to operate Muddy River No. 3 as a contract logger in an unrestrained market. As discussed *supra,* RBLC could have obtained financing without resorting to this drastic measure. The district court also properly found that KPC wrongfully terminated its contract with RBLC in September, 1973.

C. *Conclusion*

The other findings of the district court necessary to the finding of damages are also substantially supported by the evidence. The record shows that RBLC could have successfully operated the Muddy River No. 3 site as a purchase logger in an unrestrained market. We thus affirm the district court's award of $1,489,881 in treble damages.

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[16]As previously noted, prices paid by the defendants for logs were established on the basis of the loggers' costs, not the true market value of the logs. Since loggers' costs are not directly related to the market value of the harvested logs, any similarity between the price offered by the defendants and the unrestrained market price at any given time is largely coincidental.

III. OTHER ISSUES

A. *Effectiveness of ALP Jury Demand*

The appellant ALP asserts that the district court improperly allowed RBLC to withdraw its jury request over the objection of ALP inviolation of Rules 38(d)[17] and 39(a)[18] of the Federal Rules of Civil Procedure, 28 U.S.C.A. ALP seeks a remand to the district court for a trial by jury. We find that the consistent efforts of ALP to defeat RBLC's jury request demonstrated ALP's failure to rely on this request and constituted a waiver by ALP of its rights under the Rules.

RBLC and the plaintiffs in four companion cases filed jury demands and motions to consolidate the cases for trial in 1975. On July 28, 1978, the defendants ALP and KPC appeared before district court Judge Sharp and filed a motion to strike the jury demands. The motion was based on the complexity of the issues presented.

Three months later, following Judge Sharp's August 30 order that the five companion cases be tried separately,

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[17]Rule 38(d) reads:

> Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

[18]Rule 39(a) reads:

> By jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

the defendants renewed their motion that the RBLC case be tried without a jury.[19] Judge Sharp denied the motion and stated his intention to try the RBLC case first.

In May, 1980, the cases were assigned to Judge Rothstein because of Judge Sharp's illness. At Judge Rothstein's request, RBLC waived its jury demand in order to make possible an earlier trial date. KPC consented to the waiver, but ALP, in a letter to the court dated June 6, 1980, refused to consent and demanded that the case be tried to a jury. RBLC moved to strike this demand, and on July 7, 1980, the district court granted the motion. ALP now comes before this court and asserts that its refusal to consent to the withdrawal of RBLC's jury demand in the manner required by Rule 39(a) entitles it to a trial by jury under Rule 38(d).

Rule 38(d) reads, in part, "A demand for trial by jury, made as herein provided, may not be withdrawn without the consent of the parties."[20] It is widely recognized that this provision is designed to allow parties to rely upon the jury demands of other parties to the same case. *DePinto v. Provident Securities Life Insurance Co.,* 323 F.2d 826, 832 (9th Cir.1963); *Calnetics Corp. v. Volkswagen of America,* 532 F.2d 674, 690 (9th Cir.1976), *cert. denied* 429 U.S. 940, 97 S.Ct. 355, 50 L.Ed.2d 309 (1976); *Rosen v. Dick,* 639 F.2d 82, 87 (2d Cir.1980); *State Mutual Life v. Arthur Andersen & Co.,* 581 F.2d 1045, 1050 (2d Cir.1978); and 5 *Moore's Federal Practice,* ¶ 28.45 at 38-391 to 393(2) (2d ed. 1980). As a practical matter, Rule 38(d) prevents a party from withdrawing its request for a jury trial subsequent to the expiration of the period for a timely

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[19]In the district court, ALP alleged that both the challenges to RBLC's jury request were made prior to the district court's ruling that the five companion cases be tried separately. The trial court rejected this contention, and ALP does not raise it on this appeal.

[20]Rule 39(a), of course, sets forth the manner in which this consent may be granted.

demand by the other parties thereby depriving those parties of the right to a trial by jury.[21] In the present case, the persistent efforts of ALP to defeat RBLC's jury request demonstrate that ALP was not relying on that request. Therefore, ALP waived its right to rely on the protections of Rules 38(d) and 39(a).

Although ALP contends that a literal reading of Rule 38(d) compels a retrial, we decline to apply the rule in such a formalistic manner. Rule 1 of the Federal Rules of Civil Procedure advises that the Rules ". . . be construed to secure the just, speedy, and inexpensive determination of every action." As recognized by this Court in *Builders Corp. of America v. United States,* 259 F.2d 766 (9th Cir.1958), "The spirit of the Rules [of Civil Procedure] is that technical requirements are abolished and judgments be founded on facts and not on formalistic defects." *See also United Press Ass'n v. Charles,* 245 F.2d 21, 26 (9th Cir.1957), *cert. denied* 354 U.S. 925, 77 S.Ct. 1378, 1 L.Ed.2d 1435 (1957). Given these guiding principles, we conclude that the district court properly looked beyond the facial language and applied the Rules in a manner consistent with their underlying purpose.[22]

Palmer v. United States, 652 F.2d 893 (9th Cir.1981), cited by ALP, is consistent with this holding. In that case, a defendant made a timely request for a jury trial. The trial court overlooked or disregarded the demand, but the party remained silent when the case commenced without a

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[21]Fed.R.Civ.P. 38(b) provides that a demand for trial by jury on particular issues " . . . must be made not later than 10 days after the service of the last pleading directed to such issues." It is not contended that ALP made a timely demand for a jury trial under Rule 38(b); the sole issue is whether ALP was entitled under Rule 38(a) to block the withdrawal of RBLC's jury request.

[22]For an extensive discussion of the liberal interpretation of the Federal Rules of Civil Procedure, *see 2 Moore's Federal Practice,* ¶ 1.13[1] at 281-287 (2d ed. 1980).

jury. On appeal, this court recognized, "Conduct of the parties which evinces consent and appears in the record is sufficient to constitute a proper withdrawal and waiver (citations omitted)." But the court held that mere silence was insufficient to constitute a withdrawal of a jury trial demand. In the present case, the conduct of ALP fills the void left by the silence in *Palmer* and constitutes an affirmative withdrawal of any reliance on RBLC's jury demand. In these circumstances, a literal reading of Rule 38(d) would act as an instrument of delay and frustrate the purposes of the Federal Rules of Civil Procedure.

We are fully aware of this court's admonition that every reasonable presumption be indulged against the waiver of a trial by jury. *Pradier v. Elespuru,* 641 F.2d 808, 811 (9th Cir.1981). But where, as here, the appellant unambiguously and determinedly acted to defeat RBLC's jury request, the only reasonable conclusion is that the appellant was not relying on that request and thus was not entitled to invoke the protection of Rule 38(d).

B. *Statute of Limitations*

The defendants invoke the four year statute of limitations of 15 U.S.C.A. § 15b[23] and argue that the district court improperly premised liability on events occurring before March 13, 1971, four years prior to the filing of the complaint. The defendants point specifically to the district court's findings of preclusive bidding in the mid-1960's and the central role in the conspiracy of A.M. Brooks, KPC's timber manager, who retired in 1969.

It is well-settled that a plaintiff may introduce background evidence to establish a continuing course of conduct or to

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[23]15 U.S.C.A. § 15b provides in relevant part:

Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued.

cast light on the character of an existing conspiracy. *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 709-10, 82 S.Ct. 1404, 1415-16, 8 L.Ed.2d 777 (1952); *United Mine Workers v. Pennington,* 381 U.S. 657, 670 n. 3, 85 S.Ct. 1585, 1593 n. 3, 14 L.Ed.2d 626 (1965); *Independent Taxi Cab Operators Ass'n v. Yellow Cab Co.,* 278 F.Supp. 979, 986 (N.D.Cal. 1968). Furthermore, a plaintiff is entitled to a full recovery of damages suffered during the limitations period ". . . even though some undetermined portion of those damages was the proximate result of conduct occurring more than four years prior to the filing of the [complaint]." *Zenith Radio,* 401 U.S. 321, at 333, 91 S.Ct. 795 at 803, 28 L.Ed.2d 777.

In the case before us, the background evidence is necessary to establish the defendants' role in the limited market faced by RBLC in 1972; moreover, the evidence clearly shows the continuing existence of the conspiracy through at least 1975. The contract imposed on the plaintiff by KPC at Muddy River No. 3, an overt act in furtherance of the conspiracy, could only have been achieved in this atmosphere of cooperation between the defendants. The mere fact that the conspiracy began in 1959 will not bar recovery given the substantial evidence of sustained illegal activity during the limitations period.

C. *ALP's Liability*

Defendant ALP argues that it should be absolved from liability because it was in no way responsible for the events which resulted in RBLC's heavy losses at Muddy River No. 3. This contention rests on the flawed logic that RBLC's damages were solely a product of the actions of KPC at Muddy River.

An injured plaintiff seeking damages is not required to show privity or any manner of direct dealing with the defendant. *Mandeville Islands Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, 236, 68 S.Ct. 996, 92 L.Ed.

1328 (1948); *South Carolina Counsel of Milk Producers, Inc. v. Newton,* 360 F.2d 414, 417 (4th Cir. 1966). A party that participates in a conspiracy "must . . . share responsibility for the resulting damage, including that occasioned by activities in which it did not directly participate, or from which it did not directly benefit." *Twentieth-Century Fox Film Corp. v. Goldwin,* 328 F.2d 190, 212 (9th Cir. 1964); *see also Karseal Corp. v. Richfield Oil Corp.,* 221 F.2d 358, 361 (9th Cir. 1965).

In and of itself, KPC's behavior at Muddy River No. 3 did not create a cause of action for RBLC under § 4 of the Clayton Act. 15 U.S.C.A. § 15. The harm suffered by RBLC was actionable because of its causal connection to the conspiracy between the defendants. KPC's actions were not only a manifestation of the conspiracy, but were made possible only by the prior destruction of competition and the continuing cooperation between KPC and ALP. In these circumstances, ALP must share the blame for the damages to RBLC.

D. *The Admissibility of Exhibit 692*

The defendants challenge the district court's admission of Exhibit 692, the so-called "Minami Report." The defendants assert that the report constituted inadmissible hearsay and provided the sole support for the district court's finding that the defendants purposefully set log prices at levels below market value. The record, however, discloses the following facts upon which the district court could have found that the report was an admission by a party-opponent under Fed.R.Evid. 801(d)(2)(C), 28 U.S.C.A.[24]

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[24]Rule 801(d)(2)(C) provides in part:

(d) A statement is not hearsay if—

(2) The statement is offered against a party and is

(C) A statement by a person authorized by him to make a statement concerning the subject.

The report, entitled "Survey Report on ALP Woods Operation" was prepared by a Mr. Minami, an employee of the Oji Paper Company of Japan. The Oji Paper Company is a shareholder of ALP's parent company, Alaska Pulp Company ("APC"). This survey was prepared at the request of Mr. Nishizawa, ALP's chairman of the board. Mr. Minami spent 41 days in Alaska accumulating research for his report. During this time, he was given free access to all of ALP's books and records, and he was accompanied by ALP employees on visits to ALP logging camps. The final report was translated into English at APC headquarters in Japan, and Mr. Minami presented the report to a meeting of the ALP Log Committee, a meeting attended by numerous ALP executives. Following the meeting, a copy of the report was circulated to ALP officers and managers. Given these circumstances, there can be little question that Minami was "authorized" by ALP to make statements regarding the entire scope of ALP's woods operations, including the price structure for the purchase of logs. Therefore, we find that the district court properly allowed the admission of Exhibit 692 under Fed.R.Evid. Rule 801(d)(2)(C).[25]

E. *Other Evidentiary Challenges*

The defendants challenge several other evidentiary rulings of the district court. A ruling by a trial judge on the admissibility of evidence will be overturned only if there was a clear abuse of discretion. *Kaplan v. International*

[25]The Notes of the Advisory Committee on the Rules of Evidence make it clear that the common law requirement of some jurisdictions that a person authorized to speak for a principal must make a statement to a third person before that statement can be introduced as an admission has been legislatively overruled by Rule 801(d)(2)(C). *See Kingsley v. Baker/Beech-Nut Corp.,* 546 F.2d 1136, 1144 (5th Cir. 1977); *Zenith Radio Corp. v. Matsushita Electric Industrial Company, Ltd.,* 505 F.Supp. 1190, 1246 (E.D.Pa. 1980).

Alliance of Theatrical, etc., 525 F.2d 1354, 1362 (9th Cir. 1975); *Pierce Packing Co. v. John Morrell & Co.*, 633 F.2d 1362 (9th Cir.1980). We find that the trial court's actions survive the application of this test.

In any event, the court's rulings constitute harmless error under Fed. R.Civ.P.61,[26] 28 U.S.C.A. There is no showing that the trial court gave determinative weight to the challenged evidence which was admitted at trial, or that excluded evidence would have altered the district court's findings. The challenged evidence, pertaining to the existence of a conspiracy under Sections 1 and 2 of the Sherman Act, is but a drop in the bucket in light of the substantial evidence of wrongdoing in this case. In this context, there can be no showing that the court's actions affected ". . . the substantial rights of the parties." Fed.R.Civ.P. 61. *See Department of Water & Power of City of Los Angeles v. Okonite-Callender Cable Co., Inc.*, 181 F.2d 375, 382 (9th Cir.1950); *Purer & Co. v. Aktiebolaget Addo*, 410 F.2d 871 (9th Cir.1969).

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[26]Federal Rules of Civil Procedure Rule 61 provides:

> No error in either admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or admitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

IV. CONCLUSION

The district court's findings of the existence of a conspiracy in violation of §§ 1 and 2 of the Sherman Act and causal antitrust injury to the plaintiff are substantially supported by the evidence. The trial court did not abuse its discretion in any of its procedural and evidentiary rulings.

The judgment of the trial court is AFFIRMED.

REINHARDT, Circuit Judge, dissenting:

I respectfully dissent from Section III A of the majority's opinion holding that the defendants forfeited their right to a jury trial. I do not believe that Rules 38 and 39 of the Federal Rules of Civil Procedure contemplate that one party to the litigation shall have an exclusive continuing option to determine whether a trial shall be by court or jury merely because the other side vigorously contended at one point that a court trial was mandatory. In my opinion, far more is required before we can declare that a party has waived its right to a jury trial. To create an implied waiver from defendants' conduct here denigrates the principle that every reasonable presumption be indulged against the waiver of a right to trial by jury. *Pradier v. Elespuru*, 641 F.2d 808, 811 (9th Cir. 1981).

One problem with the majority's conclusion is that it ignores the practicalities of litigation. Whether or not a party desires a jury trial may well depend on what the specific alternative is. Judges are not fungible commodities. One side may prefer a trial before a particular judge to a trial by jury. For the very same reasons, the other side may not. When conditions change and a new judge is assigned to preside over the trial the views of both sides may change, as they did here. A party that initially insisted that a jury trial was essential to the very survival of our system of justice may suddenly decide that a trial before a judge is by

far the wiser course. The opposing party, having previously proclaimed vigorously that there was no right to a jury trial, may just as suddenly conclude that a trial by jury is a precious heritage which they have a constitutional right to invoke. There is nothing mystifying or surprising about such tactical changes by the parties. However, the underlying principle that overrides what is good or bad for a particular side at a particular time is the right to trial by jury. That right was just as important when defendants asserted it shortly before trial as it was when plaintiff successfully invoked it at the commencement of the proceedings.

Once a jury trial is demanded by one party in a timely manner, all parties have a continuing right to insist on a jury trial and to object to any attempted waiver by the party that originally invoked the right; the parties are also free to change their respective positions regarding a jury trial, as the two sides did here. It is clear to me that defendants had no intention of waiving all of their rights under Rule 38(d) and 39(a), and I do not believe that asserting a position that plaintiff was not entitled to a jury trial is conduct that should be held to constitute an unintended waiver.

Merely because defendants argued at an early stage in the litigation that plaintiff did not have a right to a jury trial does not in any way suggest that, if the court concluded they were wrong, defendants would be willing to waive their continuing right to object to a subsequent change in position by plaintiff. Certainly, there would be no reason for defendants to give up their right to change their own position if circumstances changed. From defendants' standpoint, the implied waiver suggested by the majority served no purpose other than to put the plaintiff in the position the majority finds it was in—having exclusive control over the decision whether the trial would be by jury or by court, with the right to make that final unilateral

decision based on the circumstances that existed just prior to the time of trial. I see no reason why objecting to an opponent's jury demand, whatever the basis for the objection, should entail such a consequence.

The majority's assertion that defendants were not relying on plaintiff's jury demand since they initially opposed it seems to me to be only partially correct. It is true that, as the majority says, that [sic] defendants did not initially rely on that demand in order to secure a jury trial. Defendants did, however, rely from the outset on the Rules that provide that once a demand is made, it cannot be withdrawn unilaterally. That reliance was, in my opinion, justified.

I do not believe that this is a case involving "technical requirements" or "formalistic defects," nor that the admonition of Rule 1 regarding "speedy and inexpensive determination of every action" provides a justification for dispensing with the right to trial by jury. While I understand the majority's reluctance to undo the results of a substantial investment of judicial time and resources, and to reward the defendants for their belated conversion to a belief in the sanctity of trial by jury, I believe that defendants were entitled under the Rules to insist on a jury trial, that they did not waive their right to trial by jury, and that a court verdict cannot stand.

Appendix B

United States District Court
Western District of Washington
at Seattle

No. C75-165SR

Reid Brothers Logging Company,
an Alaska corporation,
Plaintiff,

vs.

Ketchikan Pulp Company, a
Washington corporation; and
Alaska Lumber and Pulp Company,
an Alaska corporation,
Defendants.

Findings of Fact and Conclusions of Law

[Filed June 8, 1981]

THIS ACTION came on for trial before the Court, sitting without a jury, on August 4, 1980. All parties appeared by their counsel of record. The Court, having considered all of the evidence herein and the briefs submitted by the parties, and being fully advised, now makes and enters the following findings of fact and conclusions of law under the provisions of Rule 52(a), Federal Rules of Civil Procedure.

FINDINGS OF FACT

I. ALL ADMITTED FACTS FROM THE PRETRIAL ORDER IN THIS CASE ARE HEREBY INCORPORATED BY REFERENCE

II. FACTS RELATING TO JURISDICTION

A. *Subject Matter Jurisdiction; Venue.*

This is a civil action brought under the antitrust laws of the United States. Each defendant resides or is found or has an agent in this District.

B. *Interstate Commerce.*

The timber industry in Southeast Alaska, as engaged in by all three parties to this trial, involved a substantial and continuous flow of goods and payments in interstate commerce, including the interstate purchase and shipment of equipment and supplies for logging and milling operations, the interstate travel of employees, suppliers, and service personnel, the sale each year in interstate and foreign commerce of many millions of dollars' worth of cants, pulp, and other wood products, and the regular use of interstate and foreign carriers. Interstate commerce has been restrained and affected by the defendants' conduct, acts, and practices in violation of the Sherman Act, described *infra* in these findings.

III. IDENTIFICATION OF THE PARTIES

A. *Plaintiff Reid Brothers Logging Company.*

The plaintiff, Reid Brothers Logging Company ("Reid Brothers"), is an Alaska corporation. The company was formed in 1946 by the Reid family and the owners for most of the period until 1968 were Glenn and Martha Reid, husband and wife, and Alex and Mary Reid, husband and wife. From and after 1968, the sole owners were Glenn and Martha Reid.

B. *Defendant Ketchikan Pulp Company.*

Defendant Ketchikan Pulp Company ("KPC") is a Washington corporation. It was originally formed as a joint subsidiary of American Viscose Corporation, Inc. and Puget Sound Pulp and Timber Co., Inc. From 1963 to 1973 it was a joint subsidiary of Georgia-Pacific Company (GP) and FMC Corporation. From 1973 through March, 1975, in which month this action was commenced, KPC was a joint subsidiary of Louisiana Pacific Corporation and FMC Corporation.

C. *Defendant Alaska Lumber and Pulp Company.*

Defendant Alaska Lumber and Pulp Company ("ALP") is an Alaska corporation. It was formed as a subsidiary of Alaska Pulp Company, Ltd. ("APC"), a Japanese-owned corporation, the shares of which were and are held by numerous companies engaged in rayon manufacture, pulp and paper manufacture, banking, trading, and other commercial and industrial activities.

IV. DESCRIPTION OF THE INDUSTRY

1. Southeast Alaska is a narrow strip of mainland and an archipelago of islands stretching in a southeasterly direction from the main body of Alaska. From south to north its principal towns, none of which is connected to another by road, are Ketchikan, Wrangell, Petersburg, Sitka, and Juneau, the capital of Alaska. The Yakutat area, which lies to the northwest of Juneau, is usually considered a part of Southeast Alaska.

2. From 1959 through March of 1975, approximately 97% of the commercial timber stands in Southeast Alaska lay within the Tongass National Forest. The principal species of trees are Western Hemlock, Sitka Spruce, and cedar, the latter consisting of Alaska Yellow Cedar and Western Red Cedar. Scattered stands of cottonwood are also found in river bottoms throughout the region.

3. Both hemlock and spruce were acceptable for making pulp. Although a higher proportion of low grade logs were generally run through pulp mills rather than sawmills, both species were also usable for sawmilling. In Southeast Alaska all grades of logs were at times used for pulp; the higher grades were used by sawmills. Spruce, however, with a high strength to weight ratio, had particular value as a lumber product. Cedar was exported in round log form and was also cut into lumber.

4. The following mills played an important role in the facts of this case:

(a) The KPC pulp mill was situated in Ward Cove, just north of Ketchikan. In 1973, KPC constructed a sawmill at the same location.

(b) Ketchikan Spruce Mill (KSM) was located in Ketchikan. This mill was acquired by KPC through its parent, Georgia-Pacific in 1968.

(c) To the northwest of Ketchikan, in Klawock, was Alaska Timber Corporation (ATC). Edward Head began the construction of this sawmill, but it was acquired by KPC, and leased back to Mr. Head. During some of the years in question, Mr. Head managed this mill and had a log supply and marketing agreement with KPC.

(d) To the north, two sawmills were located in Wrangell: Alaska Wood Products (AWP), and Wrangell Lumber Company (WLC). The WLC mill had been established before World War II. In 1954 ALP leased, renovated and began operating the mill. The AWP mill was constructed by Pacific Northern Timber Corporation (PNT) in the mid-60's. In 1968 it was acquired by ALP. Following the acquisition, WLC milled principally spruce, and AWP functioned as a hemlock milling facility.

(e) Mitkof Lumber Company (MLC), a small sawmill, was located in Petersburg. Beginning in the mid-60's, MLC formed joint ventures with WLC to bid on timber sales. MLC later entered into a formal log supply and marketing agreement with WLC.

(f) The ALP pulp mill was situated in Sitka.

(g) Farther north, in the town of Haines, two more sawmills were located: Schnabel Lumber Company (SLC) and Alaska Forest Products (AFP). SLC operated pursuant to complex loan, supply and marketing agreements with

ALP. AFP's sawmill operated intermittently for a period of years and then went out of business.

(h) The Annette Hemlock Mill (AHM), was located on Annette Island, just to the south of Ketchikan. This mill, at one time operated by a company called Alaska Prince (AP), was later taken over by KPC and named AHM. Following this acquisition, KSM milled principally spruce and AHM functioned as a hemlock milling facility.

5. When KPC and ALP came to Southeast Alaska in the 1950's, they entered into long-term contracts with the Forest Service which entitled each of them to harvest timber from designated allotment areas for 50 years. KPC's allotment area was located in the south part of the Tongass National Forest, ALP's in the north. Each allotment also designated contingency areas which could be added later. The allotments did not exempt defendants from federal anti-trust laws.

6. ALP later acquired an additional allotment in conjunction with purchasing the AWP mill.

7. KPC's and ALP's allotment contracts each contained stumpage prices which, after initial operating periods of ten years, were to be adjusted every five years. The appraisal information used in these five-year rate redeterminations was also used in connection with independent timber sales. Defendants periodically selected the next allotment areas to be cut and maps of those selections were furnished to the Forest Service for appraisal purposes.

8. Outside the allotment areas, timber sales in the Tongass National Forest were periodically sold at public auction by the Forest Service. In the late 1950's and early 1960's, there were numerous loggers throughout Southeast Alaska who bid from time to time on these timber sales. These loggers formed an association, the Alaska Loggers Association (ALA), but eventually the ALA became a mill-dominated organization.

9. Each year the Forest Service would advertise sales of timber at particular locations, each with an estimated volume and species mix, and would announce a minimum bid. Written sealed bids were then received from parties interested in bidding. Although a few sales were advertised and sold as sealed bid sales (*i.e.*, the sale was awarded on the highest written bid submitted), most sales were sold at oral auctions. These oral auctions would be held among those who had submitted qualifying sealed bids (typically for the advertised minimum).

10. Bidding was based on stumpage rates, *i.e.*, a certain number of dollars per thousand board feet (MBF), which the purchaser paid the government as the timber was harvested. The minimum acceptable bid was calculated by the Forest Service through a process involving the residual value method of appraisal. The Forest Service started with the average selling value of the end products as reflected in statistics collected from the mills, and subtracted from that figure the estimated costs of getting logs from the stump to the end product stage, leaving a residual amount which was then divided between stumpage and a prescribed margin for profit and risk. This process yielded the appraised value of the stand, which would ordinarily be the minimum acceptable bid. This method of arriving at residual values and minimum stumpage prices was used throughout the United States for all national forest timber.

11. In the 1950's and early 1960's, the Forest Service designed and advertised sales requested by particular loggers. It was the Forest Service custom and practice to put up an independent sale close to where a logger was completing another sale to provide that logger the benefit of a continuing operation. Although every timber sale was advertised on a competitive basis, loggers with established operations had a natural bidding advantage with respect to new sales being offered near their existing camps.

12. The early Forest Service timber sales were mostly small sales designed for small logging operations. During the 1960's, the Forest Service, for a number of reasons, began to phase out such small sales. This decision posed a significant obstacle to the continuing operations of small purchase loggers.

13. The purchase and sale of standing timber constituted a distinct market in Southeast Alaska.

14. A second product market was the purchase and sale of logs, as distinguished from standing timber. This, in the earlier years, was done to a great extent by independent purchase loggers, that is loggers who bought timber at Forest Service sales, cut the timber and sold the logs. In the later years, defendants received almost all their log supply from contract loggers, that is, loggers under contract to log timber owned or controlled by one of the defendants. Reid Brothers Logging Company was apparently the last remaining independent purchase logger operating in Southeast Alaska when it purchased the Muddy River #3 timber sale described *infra*.

15. In the 1950's and 1960's, a large proportion of logging in Southeastern Alaska was done by "A-frame" operators, who cut timber near the beaches and pulled the logs into the water for rafting with an A-frame apparatus. Much of the other logging during this period was performed by "cat loggers," who used tractors to move logs cut near beaches to the water. These types of logging required a relatively small capital investment in equipment, personnel, engineering, and planning.

16. Commencing in the early 1960's, the coastal areas and sheltered coves suitable for A-frame and cat logging began to diminish. As the areas suitable for such logging decreased, there arose a governmental concern with the impact of such logging on the coastal environment and the

tourist industry. Therefore, A-frame and cat logging timber sales were phased out by the Forest Service.

17. Many small loggers left the business because they were either unwilling or unable to undertake the larger and more sophisticated logging operations which the Forest Service required. Truck logging, which largely supplanted the old A-frame and cat logging methods, required a larger capital investment than the previous methods used in Southeastern Alaska.

18. In a truck logging operation, logs were yarded to a central point, usually by means of a cable arrangement running from a tower (either a spar tree or a mobile, metal tower). The logs were then loaded on logging trucks, and hauled over roads usually constructed by the logger to a dump site, where they were banded into bundles, dumped and rafted.

19. Reid Brothers, unlike many other operators, was successful in assembling the capital, equipment, and personnel needed to conduct modern truck logging in Southeastern Alaska.

20. A logger who purchased timber from the Forest Service was customarily required to set up a logging camp (bunkhouse, cookhouse, repair shop, log dump, and so on) at the timber sale site. The methods of logging changed over the years. All of the various methods required falling the timber, trimming off the limbs, and bucking the limbed trees into logs of specified lengths.

21. The logs were sold on the basis of a price per thousand board feet (MBF). Rafted logs were towed from the logger's rafting area to a mill storage area. Composition of the rafts varied. Sometimes logs were sorted by grade and species (for example, pulp rafts, hemlock sawlog rafts, spruce sawlog rafts, and so on); in other instances the rafts were assembled as logs came out of the woods, and were called "camp run" rafts.

22. A closely related product market was the purchase and sale of logging services. Some of the loggers in Southeast Alaska worked as contract loggers, and increasingly so as the defendants gained dominance in the market. Contract loggers were paid for providing logging services, *i.e.*, harvesting timber to which someone else owned the stumpage rights.

23. A fourth product market was the milling and processing of logs, carried out by two types of mills; pulp mills and sawmills. In the defendants' pulp mills, wood chips, derived chiefly from the processing of whole logs, and partly from the residue of sawmill operations, were processed into wood pulp. The sawmills in Southeast Alaska produced cants as their main product. Cants were manufactured by cutting logs lengthwise into thick slabs of wood, and represented the minimum degree of manufacture required to permit export under the primary manufacture rule. A small amount of dimensional lumber was also produced.

24. The geographic market was Southeast Alaska itself, which formed a natural area for economic competition. It was distant from the other states of the Union and was subject to transportation barriers. Its distinctiveness was increased by the primary manufacture rule which required that timber cut in Alaska had to be put through at least a basic manufacturing process in Alaska before export. Because of the rule, nearly all timber cut in Southeast Alaska was milled in Alaska. There were few exceptions to the primary manufacture rule.

V. HISTORY OF THE PARTIES IN THE TIMBER INDUSTRY IN SOUTHEAST ALASKA

A. *Plaintiff Reid Brothers Logging Company.*

1. In the late fall of 1968, Reid Brothers Logging Company, which had incorporated, divided its business between Alex and Mary Reid on the one hand and Glenn and Martha Reid on the other. Alex and Mary Reid took an immediate

opportunity to do contract logging for KPC at Shoal Cove. They formed a new company called Reid Timber, Inc. Glenn and Martha Reid continued with the existing company in Petersburg.

2. At the time of the separation, Glenn and Martha Reid became the sole owners of Reid Brothers Logging Company and continued in the logging business. They kept various items of equipment and tools. In the winter of 1968-69, the Reids purchased supplies and additional logging equipment. That spring, they returned to Alaska and built a bunkhouse and a cookhouse for their logging camp.

3. Following the 1968 separation, Reid Brothers bid on the following United States Forest Service timber sales: in 1969, Agassiz Blowdown (2,200 MBF), Douglas Bay Blowdown (5,500 MBF), Mitchell Point Blowdown (19,700 MBF), and Kah Sheets Blowdown (3,740 MBF); in 1970, Shrubby Island (71,800 MBF) and North Trout Creek (66,700 MBF); and in 1972, Muddy River #3 (18,100 MBF). Reid Brothers won each of the sales except Shrubby Island and North Trout Creek.

4. In 1969, plaintiff contracted with Alaska Prince Timber Company, an independent mill operating at Metlakatla on Annette Island, south of Ketchikan, to sell logs to it. Reid Brothers completed the Agassiz sale as a purchase logger, selling the entire production to Alaska Prince during 1969 at $64 per MBF, camp run, and making a profit on that sale. Reid Brothers also entered into a contract with Alaska Prince to sell logs from the Mitchell Point and Kah Sheets sales during 1970 at $64 per MBF, with the provision that the price would be renegotiated for 1971 production. Mr. Reid calculated that Reid Brothers would produce about 10,000 MBF a year.

5. In the spring of 1970, Reid Brothers purchased additional logging equipment, including two rubber-tired skidders, a boom boat, and a sixteen-man bunkhouse. The com-

pany logged the West Portage Bay sale, when it had purchased from another logger, during the spring of 1970, and sold the production to Alaska Prince, making a profit.

6. Reid Brothers logged at Mitchell Point and Kah Sheets Bay from April until December of 1970, closed down its camp for the winter, and returned there in the spring of 1971.

7. In the spring of 1971, Reid Brothers learned that KPC had taken over Alaska Prince. KPC quoted a lower price for 1971 production than Alaska Prince had paid for logs delivered in 1970. Soon afterward, Reid Brothers ceased logging its sales at Mitchell Point and Kah Sheets.

8. In June of 1972, Reid Brothers was the successful bidder at a Forest Service timber sale called Muddy River No. 3. Plaintiff intended to commence logging the sale that year as a purchase logger and continue for three seasons. However, in the course of arranging for an advance of startup money from KPC, Reid Brothers was required by that defendant to sign a document called a "third party agreement" which transferred the stumpage rights to the mill. Reid Brothers logged at the Muddy River sale, delivering the logs to KPC from late 1972 through September 10, 1973.

9. Reid Brothers Logging Company, and the Reids personally, enjoyed good reputations for ability and integrity as loggers. Mr. Reid was active in all phases of his logging operation.

B. *Defendants Ketchikan Pulp Company and Alaska Lumber and Pulp Company.*

1. KPC and ALP functioned primarily as suppliers to the entities which owned them. Because of the predominance of sales to affiliated entities, it was impossible to accurately determine the value of the end products of the defendant mills.

2. In addition to discounts on the sales price of pulp, both of KPC's parents received various fees and commissions which served to reduce the mill's reported income.

3. ALP and its related sawmills (Wrangell Lumber Company and Alaska Wood Products) functioned primarily as suppliers to ALP's parent company, Alaska Pulp Company (APC), which in turn resold ALP's products primarily to its shareholders.

VI. SUMMARY OF DEFENDANTS' COMBINATION AND CONSPIRACY IN RESTRAINT OF TRADE, AND TO MONOPOLIZE

In carrying out the acts described in Sections VII through XV of these findings, KPC and ALP acted pursuant to an agreement, understanding, and concert of action between themselves, the purposes and the actual effects of which have been: to restrict and eliminate competition in all phases of the timber industry in Southeast Alaska to refrain concertedly from competing against each other for timber or logs; to keep would-be competitors out of Southeast Alaska by cutting off their timber supplies through preclusive bidding and other means; to eliminate mill competition by acquiring ownership or control of the sawmills in Southeast Alaska, while expanding their own operations; to control and manipulate the log supply to the few surviving mills; to pay artificially low prices to independent loggers for logs and logging services; to eliminate purchase loggers from the field; and to attain and exercise monopoly power, *i.e.*, the power to set prices and exclude competition, in the timber industry in Southeast Alaska.

Each part of the defendants' combination and conspiracy interlocked with every other part, and was aimed at the same goal of restricting and eliminating competition in the timber industry in Southeast Alaska.

In carrying out their combination and conspiracy, KPC and ALP have operated both by explicit communications with each other and by consciously interdependent action.

VII. THE PATTERN OF COLLUSIVE COMMUNICATIONS AND JOINT PROJECTS BETWEEN KPC AND ALP

1. Defendants KPC and ALP were in the position of competitors as to the procurement of timber, the procurement of logs and logging services, and the manufacture of end products.

2. Despite their position as competitors, ALP and KPC maintained a pattern of communication concerning their respective business operations, and of entering joint projects in procurement and marketing.

3. In January, 1959, KPC's timber manager, Arthur Brooks, sent confidential information to Archie Byers, his counterpart at ALP, concerning KPC's timber sale agreement, and concerning KPC's experience in log scaling. KPC later sent to ALP several more agreements, including its form of agreement for buying logs from independent loggers. During 1959, ALP's first year of operation, Mr. Brooks sent ALP a tentative log purchase agreement embodying prices which KPC intended to pay to independent loggers for logs. Mr. Brooks requested that ALP keep this log price information "strictly confidential." When KPC's log prices later were revised, Mr. Brooks sent ALP the revised log prices in detail, by species and grade. These were the prices KPC intended to offer in the forthcoming season to independent loggers for logs.

4. Following Mr. Brooks' transmittal of log price list, an ALP memorandum stated that these prices were supplied by an employee of KPC and should be held in strictest confidence to maintain contacts for this type of price information.

5. KPC provided confidential information to ALP concerning its wage scales and union agreement.

6. Two ALP accountants, Messrs. Sincock and Forhan, met with KPC officials in March, 1959, to obtain information

concerning KPC's logging costs, which KPC provided. KPC also provided ALP with information concerning various logging techniques and construction devices.

7. After Mr. Byers left ALP, Mr. Brooks' counterpart at ALP was Charles MacDonald. Mr. Brooks was a personal friend of Mr. MacDonald, and the two exchanged business information and arranged for joint commercial enterprises.

8. KPC sold spruce and cedar logs to other mills. It gave ALP's affiliate, Wrangell Lumber Company ("WLC"), preference with respect to spruce log sales and first opportunity to buy KPC's cedar logs.

9. In the early 1960's, ALP and KPC engaged in a joint venture to share in the production and processing of logs from Kosciusko Island and Heceta Island. Since the timber subject to the joint venture was allocated according to the agreements, it made no difference which of the participants was the actual bidder on any of the timber sales, and there was no competitive bidding by the participants on the timber covered by the joint venture agreement.

10. KPC and WLC exchanged logs with each other.

11. KPC provided information to ALP concerning KPC's allotment reinventory project with the Forest Service, and requested information about ALP's allotment reinventory project.

12. ALP and KPC exchanged information concerning log towing and tow rates, which were essential aspects of mill operations in Southeast Alaska.

13. KPC and ALP entered and carried out an agreement to market cedar logs in Japan and divide the profits between them. They adopted a practice whereby, on sales of cedar by KPC to ALP, one price was invoiced and treated as the public price, and a higher price, separately invoiced on a confidential basis, was the actual price. The true price was concealed from the Forest Service, the

loggers, and the public. The purpose for concealing the true price was to depress stumpage values.

14. Mr. Brooks visited the ALP mill in Sitka many times, and spoke every year on many occasions to ALP executives, both in person and by telephone.

15. Following Mr. Brooks' departure from KPC in 1969, communications between the two companies continued. Both David Murdey and Donald Finney, who shared Mr. Brooks' former responsibilities during the 1970's, had frequent contacts with ALP executives. Mr. Murdey discussed the timber industry in Southeast Alaska, while he was Timber and Lumber Manager for KPC, with numerous representatives of ALP. While holding the position of KPC's Timber and Lumber Manager, from July, 1969, through November, 1974, Mr. Murdey talked with Clarence Kramer of ALP concerning logs, independent timber sales, log supply, stumpage rates, unionization of logging camps, industry concern over the environment, Forest Service problems, the Sierra Club, tow rates, round log export, SBA set-aside rules and regulations and "a multitude of things."

16. Executives of KPC and ALP had frequent contact at meetings of trade associations to which both belonged, including the Alaska Loggers Association, the Alaska Lumbermens Association, and the National Forest Products Association.

VIII. THE DEFENDANTS CONCERTEDLY REFUSED TO COMPETE AGAINST EACH OTHER FOR TIMBER OR LOGS, AND DIVIDED THE MARKET BY AGREEMENT

A. *KPC and ALP Needed Outside Logs and Faced a Chronic Shortage of Timber*

1. While both defendants held long-term allotments from the Forest Service, it was understood from the beginning that these would not provide the pulp mills' entire

log requirements. The rest of the mills' suppy was to come from independent Forest Service sales and the purchase of logs from others.

2. Both companies were concerned about a shortage of timber on the allotments. Re-inventories demonstrated that there was less timber on the allotments than the Forest Service had estimated. The shortage meant that the companies would have to look more to outside log sources than they had initially planned. The whole Tongass Forest, both within and without the several allotments, was hard pressed to meet the requirements of the mills.

3. Throughout the period primarily covered by the evidence (1959-75), KPC and ALP claimed that they were chronically short of timber. Log supply continued to fall short of mill capacity. Both defendants were concerned about over-cutting—that is, cutting more in a year from an allotment than the annual average computed by dividing the number of years of the contract into the total volume allowable.

4. Both defendants were concerned about the possible entry of new mills which would compete for the limited timber supply and both took action to prevent new entry from occurring.

5. While both defendants needed additional timber from outside their allotments, the independent cut in the Tongass National Forest declined steadily from 1971 to 1975.

B. *KPC and ALP Concertedly Refused to Compete Against Each Other for Timber and Logs.*

1. In a competitive marketplace, KPC and ALP, faced with this chronic shortage and an ongoing concern over supply, would have competed vigorously for independent timber sales and for logs produced by independent loggers. Instead, the defendants refused to compete against

each other for independent sales or for logs throughout the period 1959-75.

2. The defendants' motives for refusing to compete were to minimize costs, to avoid paying competitive stumpage prices which could lead to competitive prices to loggers for logs, and to avoid paying competitive prices which could lead to reappraisal of their long-term allotment prices at higher levels.

3. The said course of conduct by the defendants was deliberate and interdependent. Each defendant refrained from competing against the other for timber sales and logs in reliance upon the other's reciprocal refusal to compete; competition inaugurated by either defendant would have required the other to act competitively as well in order to insure a supply.

4. When ALP entered the market, KPC pulled back from certain areas where it had traditionally procured timber, and the two pulp companies thereafter confined themselves generally to mutually-observed "operating areas."

5. Mr. Brooks described the line delineating the two defendants' operating areas as starting south of Wrangell Narrows, going west through Sumner Strait, and turning south so as to place Kosciusko and Heceta Islands within the ALP operating area.

6. Kosciusko and Heceta Islands, allocated to ALP by the defendants' agreement, constituted an area from which KPC had procured logs before ALP's entry into the market. These islands were among the best spruce areas in Southeast Alaska, but they became and remained without challenge from KPC a part of ALP's operating area.

7. Even as the timber shortage grew more severe, KPC persisted in avoiding competition by staying out of ALP's operating area.

8. In January, 1974, Mr. Finney wrote to Mr. Murdey, setting forth a proposal to modify the existing division of territory between ALP and KPC on the west coast of Prince of Wales Island. This letter reflects a pre-existing collusive division of the market.

9. Over the period 1959-75, hundreds of millions of board feet of valuable timber went to each defendant with no competition whatever from the other. Over the entire time of Mr. Brooks' tenure from the early 1950's until his departure from the company in July of 1969, he could recall no instance of KPC's having competed with ALP for timber. Mr. Hayashi of ALP testified that in the period 1971-74 the two pulp companies never competitively bid against each other on a timber sale.

10. Some of the bidding by KPC and WLC was done in their names, and some by companies organized for that purpose or loggers whom they controlled. When a controlled company or logger bid, the pulp mill dictated the extent of the bidding.

11. The record of bidding on independent timber sales reveals an unmistakable pattern of collusion by the defendants. Out of 116 sales over the ten-year period from 1966 to March, 1975, KPC and ALP bid orally against each other (directly or through others) only three times. The three exceptions all occurred in 1970, and were the Shrubby Island sale, North Trout Creek, and Bear Creek #1. These were the result of a temporary disagreement between the defendants.

12. Over the ten-year period 1966-March, 1975, there were 27 sealed bid sales put up by the Forest Service in Southeast Alaska. On these, the defendants never bid against each other at all.

13. In terms of volume, the defendants concertedly refrained from bidding against each other on 91.7% of the total volume offered by the Forest Service during the aforesaid ten-year period.

14. The defendants' refusal to compete embraced the procurement of both cut logs and standing timber. Although loggers and logs were much in demand, neither defendant ever made an offer to buy logs from a logger which it understood was selling logs to the other defendant.

IX. THE DEFENDANTS CONCERTEDLY KEPT OUTSIDE MILLS FROM ESTABLISHING COMPETITIVE FACILITIES BY CUTTING OFF THEIR TIMBER SUPPLIES THROUGH PRECLUSIVE BIDDING AND OTHER MEANS

1. ALP and KPC concertedly prevented outside mills from establishing competitive facilities in Southeast Alaska. The defendants' main purpose in excluding mill competitors was to prevent competition for logs and timber. The would-be mill entrants, having no long-term allotment areas, needed to purchase independent Forest Service timber sales, and/or to acquire logs from independent loggers, in order to get established. The defendants prevented this by bidding preclusively, each in its own operating area, to prevent the would-be entrants from getting a log supply, and by denying them access to logs produced by local loggers.

2. In 1966, the City of Petersburg made a request to the Forest Service that a large timber sale be put up that would permit the establishment of a green veneer plant in the Petersburg area. As a consequence, the Kake #1 timber sale was offered, containing an estimated volume of 264,000 MBF, the largest independent sale ever offered in Southeast Alaska. The Forest Service hoped that offering this

sale would result in the establishment of a veneer operation in Southeast Alaska. Among the bidders on the Kake#1 timber sale were three veneer-plywood companies and Mitkof-Wrangell, the eventual winner, which was a joint venture between Wrangell Lumber Company and a small Petersburg mill, Mitkof Lumber Company. Mitkof-Wrangell outbid the plywood companies, paying a bid premium (the amount in excess of the Forest Service advertised minimum) of $2,244,000. The second and third highest bidders were Tongass Veneer and Plywood and Astoria Plywood.

3. Three months after the veneer companies were outbid by ALP on the Kake #1 sale, the Forest Service offered the Tuxekan sale, located in KPC's "operating area." This was another large sale (126,600 MBF) and attracted Astoria Plywood and Tongass Plywood, two of the major veneer companies, as bidders.

4. On the morning of the Tuxekan sale, KPC and Ketchikan Spruce Mills formed a joint venture which they named Panhandle Logging Company, for the sole purpose of bidding on the sale. Panhandle was formed so that its true identity and connection with KPC would not be known. Charles MacDonald of ALP attended the sale, but ALP did not bid. Panhandle outbid both veneer companies.

5. The day after the Tuxekan sale, Tongass Plywood was outbid by Don Meurs Logging Company on the Gas Rock timber sale. Meurs bid nearly four times the advertised minimum price. Meurs was actually bidding on behalf of ALP.

6. On the Bradfield River #1 timber sale, the next sale bid on by a plywood company, WLC outbid Puget Sound Plywood.

7. In January, 1967, the Forest Service advertised the Big Harbor-Trocadero Bay timber sale for February, 1967, in the KPC operating area. Mr. Brooks anticipated that the plywood companies would bid on this sale, and wrote

to the KPC president that KPC should bid in this timber to "keep others out of our area." During the weeks following that letter, Mr. Brooks met on a number of occasions with representatives from the plywood companies.

8. One week prior to the Big Harbor-Trocadero sale, Brooks reported that he discussed the sale with the plywood companies and was told they would not bid. KPC won the sale at the minimum without competition.

9. In June, 1967, ALP met with representatives of the plywood companies. By the time of this meeting, several plywood companies had bid on timber sales in Southeast Alaska, but in every instance they failed to get a timber supply. A few days after that meeting, LOG Logging Company was the successful bidder against the plywood companies on the East Edna Bay sale. LOG was actually bidding that sale for ALP.

10. The next major timber sale offered by the Forest Service was the Shoal Cove sale near Ketchikan in September, 1967, containing 34,700 MBF. Mr. Brooks wrote to his company's president that he anticipated "strong competition" from the plywood companies and that "the bidding should be done in the name of Panhandle Logging Company to avoid having KPC bidding on high priced stumpage."

11. Faced with an inability to obtain a log supply, some of the plywood companies tried to negotiate log supplies from the defendants. They were unable to do so.

12. Mr. Brooks met with potential entrants, including plywood operators, to tell them of possible shortages of timber in the area and that there would not be enough timber to go around if they came in.

13. The defendants' concerted efforts to exclude competition were entirely successful throughout the period 1959-75. The bidding record on timber sales makes clear

that competition by ALP or KPC for timber sales was limited almost entirely to instances in which one of them was bidding against a third-party mill for timber.

X. THE DEFENDANTS FURTHER ELIMINATED MILL COMPETITION BY SYSTEMATICALLY ACQUIRING OWNERSHIP OR CONTROL OF THE SAWMILLS IN SOUTHEAST ALASKA, AND BY EXPANDING THEIR OWN OPERATIONS

A. *Defendants Acquired Ownership or Control of Virtually All the Sawmilling Capacity in Southeast Alaska.*

1. ALP and KPC acquired ownership or control of virtually every sawmill which at one time operated as an independent manufacturing facility in Southeast Alaska. These included Alaska Prince Timber Company, Ketchikan Spruce Mill, Schnabel Lumber Company, Alaska Timber Corporation, Alaska Wood Products, Alaska Forest Products, and Mitkof Lumber Company. Defendants' primary purpose in acquiring or controlling these mills was to eliminate competition for timber and logs.

2. The elimination of Alaska Prince by KPC effectively eliminated Reid Brothers' principal log buyer in the 1970's.

3. Originally, Mr. Brooks tried to dissuade Oji Paper Company of Japan from constructing its Alaska Prince mill. When this failed KPC set about to prevent AP from obtaining a log supply at anything other than prohibitively high prices.

4. KPC was concerned about AP competing for logs from independent loggers and AP's paying the individual loggers higher prices for their logs.

5. Mr. Brooks made clear to Alaska Prince that before Alaska Prince negotiated for logs from a logger, it should determine whether the logger was indebted to KPC, and if he was, should be prepared to pay his indebtedness in cash. Mr. Brooks wrote to Mr. Schmidbauer that KPC could

forestall Alaska Prince from getting logs by calling KPC's loans to its independent loggers or insisting that Alaska Prince take over KPC's financing.

6. Alaska Prince remained desperate for a timber supply. The two timber sales on which KPC knew that Alaska Prince was likely to bid were the East Side timber and the Turn Point #2 sales. KPC paid large premiums to deny Alaska Prince a supply on both of these sales.

7. KPC bid the East Side sale, in the name of Hollis Logging Company, from a Forest Service advertised minimum of $9.72 to $26.60, which Mr. Brooks described as the "highest priced sale to date on the Tongass National Forest."

8. With regard to the Turn Point #2 sale, Mr. Schmidbauer of KPC instructed the KPC timber manager to outbid Alaska Prince "regardless of cost" and "at any price."

9. In the fall of 1970, the owners of Alaska Prince approached KPC on the subject of selling the mill. They were unable to secure enough timber to stay in business.

10. Mr. Merlo recommended to his Board of Directors that KPC acquire the Alaska Prince Mill, and KPC did so in early 1971. As part of the arrangement, KPC acquired by third-party agreements the few timber sales which Alaska Prince had managed to acquire. Among the loggers selling logs to Alaska Prince at the time KPC acquired the company was Reid Brothers.

11. Ketchikan Spruce Mills (KSM) was established in 1903. Prior to KPC's starting operations in Alaska, *i.e.*, from 1903 through 1955, KSM acquired its log supply from independent loggers and by purchasing Forest Service timber sales. Beginning in about 1955-56, KSM ceased purchasing logs from independent loggers, abandoned its own

logging operations, and became dependent upon KPC for 100% of its log supply.

12. At a later time, GP threatened to build its own sawmill and raise its log prices to KSM during the period of construction. KSM sold out to Georgia-Pacific in late 1967.

13. Schnabel Lumber Company (Schnabel) operated a sawmill at Haines, Alaska, in the North Tongass.

14. In the late 1960's and through the mid-1970's, Schnabel and Wrangell Lumber Company had a ten-year agreement whereby WLC supplied logs to Schnabel and Schnabel sold all of his lumber and wood chips to WLC. During that ten-year contract, Schnabel fell progressively further into debt to WLC.

15. Throughout the early 1970's both ALP and KPC knew that Schnabel was short of sawlogs to operate his mill. However, KPC refused to sell logs to Schnabel because he was allocated by agreement to ALP.

16. ALP exercised control over the Schnabel mill by means of indebtedness, control over supply, and restrictions on Schnabel expressed in the agreements between Schnabel and WLC.

17. Edward Head had been an experienced mill operator in Northern California. In 1969, he formed Annette Timber Company (predecessor to Alaska Timber Corporation) and sought to obtain timber sales to support a new mill operation.

18. Mr. Head acquired the Devil's Club #2 sale in June, 1969. Mr. Schmidbauer then instructed Messrs. Murdey and Finney of KPC to keep Mr. Head from purchasing any additional timber sales or establishing a competing mill. Mr. Murdey discussed Head's efforts to obtain financing from the National Bank of Alaska with the bank's manager.

19. Unable to obtain sufficient financing, Mr. Head was finally obliged to sell his partially completed sawmill to KPC in exchange for a commitment for financing to complete construction and a lease-back and purchase-option. The agreement also provided that KPC would supply the mill with a guaranteed volume of logs annually for a ten-year period and would have the right to market all of its lumber production.

20. The Alaska Forest Products (AFP) sawmill was operated at Haines, Alaska, by Dant & Russell. AFP and WLC had a ten-year agreement which gave WLC the right to purchase all of AFP's production.

21. During 1973-75, AFP faced a critical log supply problem. Leroy Lambert, timber manager for Dant & Russel, traveled to Sitka in August, 1974, to attempt to purchase logs for AFP. ALP advised Lambert that there were no logs available, and that it had none for sale.

22. AFP bid on the Hamilton River #1 timber sale on October 18, 1974. The purchase of that sale by AFP was regarded as vital by the company's management.

23. ALP outbid AFP on the Hamilton River #1 sale, which was located within ALP's operating area, by bidding stumpage from the advertised minimum of $17.10 to $63.72. KPC did not bid on the sale.

24. Still seeking a supply, AFP bid on the Bear Creek #2 sale. This sale was located in the KPC operating area. ALP did not bid. KPC outbid AFP on the sale, bidding the hemlock from $21.09 to $43.00. AFP subsequently closed down its mill.

25. The Alaska Wood Products (AWP) mill was constructed in the mid-1960's in Wrangell. In 1968, WLC purchased the outstanding stock of AWP.

26. Mitkof Lumber Company (MLC) began operation as a small sawmill in approximately 1954. In 1966, Mitkof entered into a joint venture agreement with Wrangell Lumber Company, at the latter's suggestion, for the purpose of bidding on the large Kake #1 timber sale and the Shrubby Island timber sale.

27. In late 1973 or early 1974, WLC approached Lars Eide, the owner of Mitkof, and offered to purchase Mitkof's stock. It was agreed that WLC would (1) acquire 40% of the Mitkof stock, (2) fill Mitkof's log requirements at Wrangell's cost, and (3) market the cants which Mitkof would produce for a percentage commission.

28. WLC's attorneys were concerned that the proposed acquisition might run afoul of SBA regulations and might disqualify Mitkof from bidding on small business set-aside sales. The agreement was therefore modified to provide that Mitkof stock would be sold to individuals in Tacoma who were minority shareholders of the company; the full amount necessary to purchase the stock ($403,975) would be loaned by WLC; and WLC would have an option to purchase the Mitkof stock. The transaction was completed on this basis in the spring of 1974.

B. *Defendants Expanded the Capacity of Their Own Milling Operations.*

1. In addition to their acquisition of sawmill facilities, both KPC and ALP expanded their own operations.

2. The KPC pulp mill had been constructed in 1954 with a theoretical capacity of 350 tons per day. By 1975 it had been expanded to produce 600-630 tons per day. KPC initially had no sawmill capacity. In addition to the sawmills it acquired, it constructed an additional sawmill adjacent to its pulp facility at Ward Cove.

3. ALP increased its sawmill capacity from approximately 40,000 MBF in 1961 to 150,000 MBF in 1973, including the acquisition of Alaska Wood Products. ALP also increased the capacity of its pulp mill during this period.

XI. THE DEFENDANTS USED "FRONTS" AND CONTROLLED COMPANIES TO CARRY OUT THEIR CONSPIRACY

1. From the mid-1960's on, both defendants used "fronts" and controlled companies as one means of carrying out their conspiracy. Their purposes in doing business through such organizations, rather than in their own names, were to conceal certain of their bidding activities on independent Forest Service timber sales, to avoid association with what they described as high-priced stumpage, to conceal their exclusion of potential entrants, to obscure their control over contract loggers, and to avoid criticism directed at their increasing control over the industry.

2. Panhandle Logging Company was one of the fronts used by KPC. It was formed by KPC and Ketchikan Spruce Mills in 1966, before KPC acquired KSM. Its only function and purpose was to bid on timber sales for KPC. Panhandle bid successfully on the Tuxekan sale in 1966. Both KPC and KSM submitted qualifying bids for the sale, but did not bid orally.

3. Panhandle also won the Shoal Cove timber sale. This occurred after KPC's acquisition of KSM. KPC again submitted a qualifying bid, but did not compete in the oral bidding. The sale was managed and financed by KPC.

4. Straits Logging Company, originally an independent logging company, was used by KPC to bid timber sales and to promote and advocate positions favorable to the pulp mills. Straits appeared in the role of an independent logging company long after all right, title and interest in Straits had been assigned to KPC.

5. KPC also used other controlled logging companies like Carroll Creek when it submitted bids. As with Straits, its ownership by KPC was concealed from the general public.

6. KPC used Morris & Sublett, another logging firm, to bid on the Bat Cove timber sale, with the aid of a cashier's check on which KPC's name did not appear.

7. KPC bid the Carroll A-frame show through Tom Williamson.

8. ALP did not bid on timber sales in its own name. Although timber and log procurement were handled by ALP's woods division manager at Sitka, the bidding on timber sales was always done in the name of WLC, AWP, or an ALP-owned or controlled logging company.

9. ALP acquired L.O.G. Logging Company in 1963 and Don Meurs Logging Company in 1964. In each instance ALP transferred the stock to nominee shareholders. L.O.G. and Meurs were frequent bidders on Forest Service timber sales. From and after the time of their acquisition, the bidding by these companies was in fact done for ALP.

10. Much of the defendants' preclusive bidding against outside mills was done in the names of bidding fronts. This was true, for example, with respect to the Tuxekan, Shoal Cove, and Kake #1 sales. In all instances in which KPC and ALP bid successfully against plywood and veneer companies seeking to get established in the market, the bidding was done through controlled logging companies.

11. During the 1960's and 1970's the defendants made increasing use of mill-owned or controlled loggers which retained or adopted names implying that they were independent.

XII. PURSUANT TO THEIR CONSPIRACY DEFENDANTS PAID ARTIFICIALLY LOW PRICES TO LOGGERS FOR LOGS, AND ELIMINATED PURCHASE LOGGERS FROM THE FIELD

A. *Artificially Low Prices for Logs and Logging Services.*

1. The defendants adopted a common scheme of paying artificially low prices for logs and logging services. The prices paid were related to defendants' estimates of logging costs, not to the value of logs, and resulted in loggers accumulating massive debt account with the mills.

2. This was done with both purchase and contract loggers. As this system worked, defendants advanced funds to loggers to cover the difference between the prices paid and the higher cost which the loggers actually incurred. Defendants knew, or expected, that these advances would not be repaid.

3. Both defendants utilized various devices such as operating assistance allowances, bonuses, retroactive price increases, debt write-offs, account adjustments and non-price subsidies. The intended and actual effects were to reduce costs of procurement and avoid statistics which could lead to increased stumpage prices. These devices were used to keep selected loggers functioning but under control. As a practical matter, when one of the defendants cut off further financing of an indebted logger, the logger would go out of business. The defendants then acquired the companies themselves or their assets.

4. The defendants' systematic restraint of prices was interdependent. Each could, and did, impose artificially low prices upon loggers only on the basis that the other would do the same.

5. Had either defendant commenced to pay competitive log prices, the other would have been compelled to follow suit; but that did not occur.

B. *The Result of Defendants' Collusive Pricing Was the Elimination of Independent Logging Companies*

1. Defendants' administered prices tended to eliminate independent loggers and replace them with defendant-owned or controlled companies.

2. Control over the following companies was acquired by KPC: Norton Logging, J & H Logging, H & G Logging, Hagen & Sundsten Logging, Island Enterprises, Burrell Logging, Morris & Sublett Logging, Hollis Logging, Davidson Logging, Venable Logging, Williamson Logging, LeMay Logging, Sunny Bay Logging, Ed Johnson & Sons Logging, Winsenberg Logging, and Sawyer Reynolds Logging.

3. Control over the following companies was acquired by ALP: L.O.G. Logging, Don Meurs Logging, Whitewater Logging, Barton & Reynvaan, Clear Creek Logging, Mud Bay Logging, and Tyler Brothers.

XIII. KPC AND ALP ATTAINED AND EXERCISED MONOPOLY POWER IN THE TIMBER INDUSTRY IN SOUTHEAST ALASKA

A. *Geographic Market and Product Markets.*

1. These are set forth earlier in these findings.

B. *Defendants' Market Share.*

1. Over the period 1959-75, KPC and ALP combined purchased over 90 percent of the timber that was being cut in Southeast Alaska and manufactured at least 90 percent of the manufactured products. The 90 percent market share was divided about equally between the two defendants.

C. *The Defendants' Attainment and Exercise of Monopoly Power.*

1. The defendants attained and exercised monopoly power, that is, the power to set prices and exclude competitors in the timber industry in Southeast Alaska.

2. The defendants' attainment of monopoly power resulted from their collusive use of their position as pulp mills to exclude and extinguish all competition for logs and to eliminate competition between themselves.

3. The defendants exercised their monopolistic power to set prices by paying loggers artificially low administered prices for logs and logging services, rather than prices based on supply and demand.

4. The defendants' monopoly power was unlawfully attained and was unlawfully exercised to the injury of non-defendant mills and loggers in Southeast Alaska.

XIV. CO-CONSPIRATORS

In carrying out their combination and conspiracy, the defendants acted with and used other co-conspirator persons, firms, and corporations, including: Wrangell Lumber Company, Alaska Wood Products, Ketchikan Spruce Mills, Georgia-Pacific Corporation, Louisiana-Pacific Corporation, FMC Corporation, Alaska Pulp Company Ltd., Alaska Loggers Association, Panhandle Logging Company, Straits Logging Company, Pacific Commercial Company, Don Meurs Logging Company, L.O.G. Logging Company, and other "front" and affiliated companies. The participation of some of the said co-conspirators was the result of economic compulsion by the defendants. Each of the said persons, firms, and corporations performed acts or made statements in furtherance of the combination and conspiracy as set forth elsewhere in these findings.

XV. REID BROTHERS WAS DAMAGED BY DEFENDANTS' COMBINATION AND CONSPIRACY IN RESTRAINT OF TRADE, AND BY THEIR EXERCISE OF MONOPOLY POWER

A. *Reid Brothers, as a Purchase Logger, Would Have Received in an Unrestrained Market Prices Which Reflected the Market Values of Its Logs.*

1. When a log market is restrained, as the Southeast Alaska market was by the defendants' anticompetitive conduct, the result is injury to the log suppliers. As a direct result of the defendants' antitrust violations, Reid Brothers received less for its logs, and hence less net income, than it would have received in an unrestrained market.

2. There was substantial unused mill capacity in the pulp mills and in other sawmills of Southeast Alaska throughout the years 1971 through 1974. The unused capacity each year was far greater than would have been needed to consume Reid Brothers' logs. In a competitive market, manufacturers will normally pay whatever is needed to acquire logs in order to operate at full capacity, so long as they can do so at a professional level.

3. By the time Reid Brothers purchased the Muddy River #3 sale, competition in the market had been eliminated by the defendants' conspiracy and monopolization. Alaska Prince, which had bought logs from Reid Brothers, was no longer in business.

4. Absent defendants' anticompetitive conduct, Reid Brothers would profitably have operated as a purchase logger at Muddy River No. 3. This logging would have been completed in 1974. Reid Brothers' logging capacity in 1972 was in excess of ten million board feet per year.

5. On September 10, 1973, Mr. Finney of KPC wrongfully terminated its contract with Reid.

6. In an unrestrained market, Reid Brothers would, although with difficulty, have been able to raise sufficient funds to operate as a purchase logger at Muddy River No. 3. Start-up financing could have been obtained from a combination of the Reids' personal assets and as much as $100,000 from the Hammer & Wikan Retail Store. In an unrestrained market, log prices would have justified such an investment. Once Reid Brothers started Muddy River #3 as a purchase logger, it could have logged the sale through to conclusion at the price levels which would have prevailed in an unrestrained market.

7. In an unrestrained market, contractual log prices between Reid Brothers (as a purchase logger) and KPC (or other log buyer) would have been renegotiated on at least an annual basis.

8. KPC's offer of $64.00 per MBF for Reid Brothers' logs from Muddy River No. 3 was a "cove price": it applied to logs rafted and ready to tow at Reid Brothers' booming grounds. KPC was to bear all the expenses of towing (including insurance), booming and rafting gear, scaling, and forestry and engineering assistance.

9. To place log mill pond prices on the same footing as KPC's "cove price" offer to Reid Brothers in 1972, the costs of towing, scaling, booming and rafting gear, and forestry and engineering, along with a reasonable allowance for profit and risk on these expenses, must be subtracted from such log mill pond prices.

10. Upon making these adjustments, it appears that KPC's price offer fell considerably below the prices which a purchase logger in an unrestrained market could have commanded between 1972 and 1974. This differential is primarily attributable to defendants' conduct in artificially restraining the log prices paid by mills.

11. Had the market in Southeastern Alaska not been artificially restrained by defendants, Reid Brothers would not have agreed to log Muddy River No. 3 as a contract logger for KPC.

12. In a genuinely competitive market, stumpage rates between 1972 and 1974 would have been higher than they were in fact. Rising log prices would have encouraged more active bidding by mills and purchase loggers. This incentive to bid, however, would not have increased substantially until the dramatic end-product price increases of 1973 and 1974. Even if log prices had been unrestrained, the evidence fails to establish that a significantly higher bid price would have been required for Reid Brothers to purchase that sale.

13. In an unrestrained market, a significant percentage of end-product price increases would be "passed through" the mills to log owners (e.g., purchase loggers). This "pass through" is accomplished by periodic (e.g., annual) price increases in the contracts by which mills purchase their supply. "Pass through" is reduced when mills have substantial log inventories, or when end-product price increases are sudden or short-lived departures from traditional price trends.

14. Dr. Carl A. Newport's comparison between Western Washington and Southeastern Alaska provides a reasonable basis for determining how end-products price increases would have benefited a purchase logger in a competitive market, operating at Muddy River No. 3 between 1972 and 1974.

15. The price paid by a mill to a purchase logger in a competitive market is determined by forces of supply and demand. Assessing these factors as they existed in Southeastern Alaska during the period of plaintiff's claim, the Court finds that 30% of end-product price increases

would have been "passed through" to Reid Brothers at Muddy River No. 3. In Southeastern Alaska, the capital intensiveness of pulp milling would tend to increase the mills' share of end-product price increases, even in a competitive market.

16. Reid Brothers' profit at Muddy River No. 3 would have been a function of the escalating prices for hemlock, spruce, cottonwood, and culls, that would have been paid in an unrestrained market. Logging costs are best determined by following Dr. Newport's "Alternative I" calculation in Exhibit A-4137. Revenues can best be determined by making an adjustment to Dr. Newport's "Alternative II" values in the same exhibit. This adjustment would reflect a 30% "pass through" of end-product price increases.

17. Reid Brothers' net recoverable damages are computed by subtracting plaintiff's costs from the revenues it would have received in an unrestrained market.

18. Assuming an annual adjustment to the price of each species at Muddy River No. 3, Reid Brothers would have earned revenues totalling $2,111,838.

19. Reid Brothers' revenues at Muddy River No. 3 would have been offset by costs in the amount of $1,615,211.

20. If follows that as a result of defendants' anticompetitive restraint of log prices, Reid Brothers Logging suffered a total loss of profits at Muddy River No. 3 in the amount of $496,627.

21. Under the applicable antitrust laws, Reid Brothers is accordingly entitled to treble damages in the total amount of $1,489,881.

22. Site conditions at Mitchell Point and Kah Sheets made logging unusually difficult and expensive. With blowndown timber running as high as 80% (by Glenn Reid's admission) of the combined sales, all production-related logging costs far exceeded Forest Service regional aver-

ages. These cited conditions were the primary cause of Reid Brothers' unusually low rate of production at Mitchell Point and Kah Sheets.

23. Even in a hypothetical unrestrained market, end-product prices and logging costs were such that Reid Brothers would not have made any profit by logging at Mitchell Point and Kah Sheets.

CONCLUSIONS OF LAW

1. Jurisdiction is vested in this Court, as to plaintiff's antitrust claim herein, by virtue of the provisions of 15 U.S.C. §§ 15, 22, and 26. The Court has pendent jurisdiction over plaintiff's alternative breach of contract claim, and jurisdiction over the counterclaim of defendant Ketchikan Pulp Company, under the provisions of Rule 13, Federal Rules of Civil Procedure.

2. The conduct of defendants Ketchikan Pulp Company and Alaska Lumber and Pulp Company, described in the foregoing Findings of Fact, constituted a combination and conspiracy in restraint of trade and commerce in violation of Section I of the Sherman Act (15 U.S.C. § 1), and a conspiracy and attempt to monopolize, and an actual monopolization of, trade and commerce in violation of Section 2 of the Sherman Act (15 U.S.C. § 2).

3. The plaintiff Reid Brothers Logging Company was damaged in its business by the defendants' aforesaid antitrust violations in the amount of $496,627. Under the provisions of Section 4 of the Clayton Act (15 U.S.C. § 15), plaintiff is entitled to judgment against defendants and each of them in the amount of threefold its actual damages, together with its cost of suit including a reasonable attorney fee.

4. Defendant Ketchikan Pulp Company is entitled to judgment on its counterclaim against plaintiff in the

amount of $36,000, the figure to which the parties have stipulated. The said amount should be offset against the full amount of plaintiff's recoverable damages, *i.e.*, after the latter are trebled in accordance with 15 U.S.C. § 15.

5. The application of plaintiff for injunctive relief under the provisions of 15 U.S.C. § 26 is deferred for later consideration by the Court.

6. The Court finds that there is no just reason for delay. Accordingly, under the provisions of Rule 54(b), Federal Rules of Civil Procedure, the Clerk of this Court is hereby directed to enter judgment forthwith for plaintiff on its damages claim against defendants and each of them, and for defendant Ketchikan Pulp Company against plaintiff on its counterclaim, in conformity with these Conclusions of Law.

7. The plaintiff's application for attorney fees under 15 U.S.C. § 15 shall be decided hereafter. Any award made by the Court in that regard shall be reflected in a supplemental judgment.

The Clerk of this Court is directed to send uncertified copies of these Findings of Fact and Conclusions of Law to all counsel of record.

DATED at Seattle, Washington, this 5th day of June, 1981.

/s/ BARBARA J. ROTHSTEIN
Barbara J. Rothstein
United States District Judge

Appendix C

United States Court of Appeals

For the Ninth Circuit

Nos. 81-3444, 81-3448

Reid Brothers Logging Company,
an Alaska corporation

Plaintiff-Appellee,

v.

Ketchikan Pulp Company,
a Washington corporation,

and

Alaska Lumber and Pulp Company,
an Alaska corporation,
Defendants-Appellants.

[Filed May 23, 1983]

ORDER

Before: BROWNING, Chief Judge, TUTTLE* and REINHARDT, Circuit Judges

The Panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*Honorable Elbert Parr Tuttle, Senior Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

Appendix D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Act (15 U.S.C. § 1) (1976) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . .

2. Section 2 of the Sherman Act (15 U.S.C. § 2) (1976) provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .

3. Section 4 of the Clayton Act (15 U.SC. § 15) (1976) (amended 1980) provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

4. Section 4b of the Clayton Act (15 U.S.C. § 15b) (1970) (amended 1976) provides:

> Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause

of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.

5. The Seventh Amendment provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

6. Rule 38(d), Fed. R. Civ. P. provides:

A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

7. Rule 39(a), Fed. R. Civ. P., provides that when a trial by jury has been demanded, the trial shall be by jury unless:

(1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury . . .

8. 36 C.F.R. § 221.25(i) (1975) provides:

(i) Subject to the other provisions of this section, timber cut from the National Forests in the State of Alaska may not be exported from Alaska in the form of logs, cordwood, bolts, or other similar products necessitating primary manufacture elsewhere without prior consent of the Regional Forester. This requirement is determined to be necessary in order to assure the development and continued existence of adequate wood processing capacity in that State essential to the sustained utilization of timber from the National Forests located therein which is geographically isolated from other processing capacity. . . .

Appendix E

In the Supreme Court
of the United States

October Term, 1982

No. 82-328

Borden, Inc., Petitioner

v.

Federal Trade Commission

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION SUGGESTING MOOTNESS

The Solicitor General, on behalf of the Federal Trade Commission, suggests that this case has become moot because it has been settled, and that in the circumstances, the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to that court with instructions that it remand the case to the Commission for entry of the modified cease-and-desist order to which the parties have agreed.

STATEMENT

1. In this case the Federal Trade Commission found that petitioner Borden, Inc., violated Section 2 of the Sherman Act, 15 U.S.C. 2, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by monopolizing the market for processed lemon juice in the United States (Pet. App. 42a n.4). The court of appeals affirmed (*id.* at 1a-32a).

The Administrative Law Judge ("ALJ") found (Pet. App. 94a-198a): (1) that petitioner possessed monopoly

power in the national market for processed lemon juice; and (2) that petitioner had intentionally used this power to repulse competitive initiatives by new entrants through selective geographic price discrimination and promotions that produced unreasonably low prices in contested areas. He expressly found, however, that petitioner had always priced above its own average variable costs (*id.* at 166a-176a).

The Commission unanimously adopted the ALJ's findings concerning the product and geographic markets and Borden's monopoly power in them (Pet. App. 42a-53a, 74a-78a). Basing their decision solely on Section 2 of the Sherman Act (*id.* at 42a n.4), all five Commissioners agreed that Borden had violated that statute, and thus Section 5 of the Federal Trade Commission Act, by using its monopoly power to restrain competition (Pet. App. 39a-93a).[1]

The Commission found that Borden's power was traceable directly to the ReaLemon trademark (Pet. App. 65a):

> In order to preserve its market dominance it manipulated the price premium which that trademark afforded, and engaged in price discrimination. ReaLemon's juice was indistinguishable in its characteristics from competing processed lemon juices; only the market power inherent in the ReaLemon trademark enabled Borden to manipulate price differentials and discriminate among customers in different areas to maximize its advantage over other producers.

Although it concluded that an image advantage permitting the maintenance of a price premium is like a unit cost advantage, the Commission condemned Borden's pricing practices because temporary price cutting that excludes

[1]Two members, concurred separately (see note 4, *infra*).

" 'producers handicapped only by an inferior brand image is socially undesirable' " (Pet. App. 65a).[2]

The Commission noted also that certain commentators condemn as predatory only sales below average *variable* cost, while others also disapprove of sales below average *total* cost, with the intent to exclude an equally efficient competitor.[3] It ruled that while the record did not show "ReaLemon was sold below average *variable* cost, at least not as a consistent course of conduct, it does appear that Borden sold below average *total* cost, when fixed costs are added in" (Pet. App. 61a (emphasis added)). The Commission then held (*id.* at 65a-66a (footnotes omitted)):

> [W]hether or not Borden sold below short-run marginal cost, it is incontrovertible that its pricing practices, including geographic discrimination which was not cost-justified and pricing very close to average variable cost, were exclusionary in intent and effect. To the extent that Borden priced below average total cost with the evident intent to exclude Golden Crown, its practices run afoul of Posner's rule [see note 3, *supra*]. In any event, the effect of Borden's spurious product differentiation, making it necessary for competitors to sell considerably below ReaLemon, created a circumstance where even prices above marginal cost could, as the record indicates [Pet. App. 176a-178a,]

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[2]The Commission was quoting from Scherer, ***Predatory Pricing and the Sherman Act: A Comment***, 89 Harv. L. Rev. 869, 889 (1976).

[3]The Commission observed that "[v]ariable costs are costs which vary as output varies, as distinguished from fixed costs, which remain constant at differing levels of output" (Pet. App. 60a n.30). The "average variable cost" test for predatory pricing is proposed in 3 P. Areeda & D. Turner, ***Antitrust Law*** § 715d (1978). The "average total cost/intent to exclude" test is proposed in R. Posner, ***Antitrust Law: An Economic Perspective*** 188-193 (1976).

be predatory in the sense that even equally efficient competitors could be driven from the market.

The Commission's final order (Pet. App. 93a) provided that whenever the effect would be to "hinder, restrain or eliminate competition" between Borden and its competitors in the sale of processed lemon juice, Borden was prohibited from discriminating in price to any customer without cost justification, selling ReaLemon below its cost or at unreasonably low prices, or granting promotional allowances or payments for promotional services. The Commission explained that "[w]hether a price is 'unreasonably low' must be determined by reference to Borden's own costs, its awareness of its competitors' costs, historic price differentials, and competitive conditions in the market" (Pet. App. 68a n.41).[4]

2. On petition for review, a divided court of appeals affirmed and enforced the Commission's order (Pet. App. 1a-32a). It held that substantial evidence supported the Commission's findings (*id.* at 12a-22a). Moreover, the court ruled that, like the Commission, it need not choose between the average variable or average total cost tests in order

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[4]Commissioner Clanton's separate concurrence endorsed the majority view that Borden had unlawfully maintained its monopoly power, but he would have based liability exclusively on a finding that in some markets Borden had priced below its average variable costs (Pet. App. 74a-77a). He also would have limited the final order to prohibiting sales below average variable costs (*ibid.*).

Commissioner Pitofsky, also concurring separately, agreed with the majority that Borden's manipulation of its brand-based premium price to drive equally efficient rivals out of the market was a key element in finding monopolization, to the extent that Borden priced below its average total costs. He concluded, however, that little weight should be given to Borden's intent (Pet. App. 78a-93a). He also questioned geographic price discrimination as an independent basis of liability (*ibid.*). Commissioner Clanton shared these reservations (*id.* at 74a).

to determine predation (*id.* at 28a). Instead, the court held (*id.* at 29a):

> that when a monopolist, through brand indentification or otherwise, can and does manipulate prices in such a way as to exclude equally efficient competitors by requiring them to sell below their average variable costs, such price manipulation is an unreasonable use of power to maintain the monopolist's market position.

Judge Kennedy, dissenting (Pet. App. 33a-38a), concluded that the record contained no proof that Borden had an intent to use its monopoly power in an unreasonably anti-competitive manner, and that its efforts to win market share by advertising, promotional campaigns and price reduction evidenced the normal competitive process. She emphasized that the Commission had not found that Borden used monopoly profits in one market to subsidize losses in others or that its selective price reductions violated the Robinson-Patman Act. Borden's reliance on consumer preference for its trademarked product was also proper. The Commission's decision, in her view, improperly required Borden to establish an above-cost price umbrella to protect competitors.

3. After the petition for a writ of certiorari had been filed, the Commission agreed with Borden to settle the judicial review proceedings. Under the terms of the settlement, the Commission will, upon reacquiring jurisdiction, enter a modified cease-and-desist order.[5]

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[5]The Commission has no jurisdiction to change its prior order so long as the record in the case is before the courts on judicial review. 15 U.S.C. (& Supp. V) 45(b) and (c). Upon the completion of all proceedings on judicial review, including any proceedings on petition for a writ of certiorari in this Court, the Commission will reacquire jurisdiction to alter, modify or set aside its order. 15 U.S.C. 45(g).

On March 3, 1983, the Commission published in the Federal Register a notice inviting public comment on a proposed agreed order in settlement of the proceedings. The proposed order bars Borden, for a period of seven years, from pricing processed lemon juice below Borden's variable costs for the product in any sales district. In addition, the order contains detailed definitions of its terms and a requirement that Borden file annual reports containing information necessary to permit the Commission to monitor compliance (48 Fed. Reg. 9023-9032 (1983), App. A. *infra,* 1a-42a).

The proposed order was accompanied by an explanatory statement to aid public comment (48 Fed. Reg. 9024 (1983), App. A. *infra,* 6a). The statement notes that the Commission had determined to settle the pending litigation because the decision under review did "not set forth a satisfactory, cost-based standard for predation under Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act" (*id.* at 9025, App. A, *infra,* 7a). Continued defense of the decision before this Court would be inconsistent with its present view, which is that the grounds of its decision under review "may discourage dominant firms from vigorously competing" (*id.* at 9025, App. A. *infra,* 8a).

The Commission concluded that its earlier treatment of Borden's trademark was mistakenly based upon a view of "product differentiation as something pernicious in and of itself, which rendered suspect *any* attempt by Borden" to respond to competition by reducing price (48 Fed. Reg. 9025 (1983), App. A, *infra,* 10a). This approach, it concluded, failed to consider "the competitive advantages of Borden's product differentiation, and antitrust law's promotion of interbrand competition" *id.* at 9026, App. A, *infra,* 11a-12a). The Commission also found its earlier treatment of geographic price discrimination to be unsound

because it would improperly require, dominant firms to maintain uniform monopoly prices nationwide in order to protect competitors, a result that it characterized as paradoxical and anticompetitive (*id.* at 9026-9027, App. A, *infra,* 12a-13a). It also found its earlier treatment of Borden's intent to be mistaken. That intent simply reflects a purpose to compete in defense of existing market share. The Commission's earlier finding of predatory intent did not rest upon sub-cost pricing that might be condemned as exclusionary under Section 2 of the Sherman Act, but rather on executive plans that were wholly consistent with zealous competition (48 Fed. Reg. 9026 (1983), App. A, *infra,* 13a-14a). Finally, the Commission determined that its earlier opinion had erroneously invited the court of appeals' holding "condemning price manipulation by a monopolist if such conduct forces its *competitors* to price below *their own* average variable cost" (*id.* at 9026, App. A, *infra,* 15a-17a). It declared that such a pricing umbrella is wholly inconsistent with the concept of price competition the Sherman Act was designed to promote.

For these reasons, the Commission concluded that its earlier opinion had not clarified a proper standard for determining predatory pricing by dominant firms, nor was it consistent with sound antitrust policy under Section 2 of the Sherman Act. The Commission therefore determined tenatively to accept the proposed agreed order, subject to a 30-day comment period. It emphasized, however, that the standard set forth in that proposal would not necessarily be appropriate in any other case, and that the order was being adopted simply as "an appropriate settlement of the pending litigation" (48 Fed. Reg. 9028 (1983), App. A, **infra,** 18a-20a).[6]

[6]Commissioner Clanton issued a separate statement emphasizing the latter point (48 Fed. Reg. 9028 (1983), App. A, *infra,* 20a-22a).

Commissioner Pertschuk dissented on the grounds that it was improper for the Commission to revise its decisions administra-

Five comments were received in response to the notice. After considering them, the Commission, by minute order of April 21, 1983, voted to accept the settlement, and to ask this Court to grant certiorari, vacate the court of appeals decision, and to direct a remand to the Commission for entry of the agreed order.[7]

DISCUSSION

Petitioner's consent to the entry against it of a modified cease-and-desist order as soon as the Commission reacquires jurisdiction in this case terminates the case or controversy presented by Borden's petition for review in the court of appeals and renders this case moot. *Hammond Clock Co.* v. *Schiff*, 293 U.S. 529 (1934); *J. Aron & Co.* v. *Mississippi Shipping Co.*, 361 U.S. 115 (1959). In the circumstances of this case, the Court should follow the practice used in *J. Aron, supra,* by granting the petition for writ of certiorari, vacating the judgment of the court of appeals, and remanding the case to that court with directions for its disposition. Since the Commission has agreed to enter the agreed order when it reacquires jurisdiction, the court of appeals should

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tively while they were pending on judicial review; that the earlier decision reflected sound antitrust policy; and that the proposed revised order was deficient in numerous respects (48 Fed. Reg. 9028-9030 (1983), App. A, *infra,* 23a-31a). He subsequently dissented from the request for vacation of the court of appeals' judgment (App. B, *infra,* 43a-44a).

Commissioner Bailey also dissented. She disagreed with the policy analysis in the Commission's statement; found the proposed order to pose numerous practical problems of enforcement; and concluded that the proposed settlement reflected a serious distortion of both the administrative process and the proper relationship between agencies and reviewing courts (48 Fed. Reg. 9030-9032 (1983), App. A, *infra,* 31a-40a).

Commissioner Douglas issued a separate statement concurring in the majority's reasoning and disputing the dissenters' positions (48 Fed. Reg. 9032 (1983). App. A, *infra,* 41a-42a).

[7]Commissioners Bailey and Pertschuk opposed.

be directed to remand the case to the Commission for that purpose. Cf. *Board of Governors of the Federal Reserve System v. Security Bancorp*, 454 U.S. 1118 (1981).

The suggested disposition is appropriate in this case. First, it is evident from the statement explaining the Commission's repudiation of the decision affirmed below (see pages 6-7, *supra*) that Borden's petition for a writ of certiorari presents a substantial question of antitrust law; the pricing standards dominant firms may adopt, consistently with Section 2 of the Sherman Act, in competing to defend their share of local markets. Second, if not vacated, the decision of the court of appeals would be likely to spawn legal consequences affecting both the interpretation of Section 2 of the Sherman Act by district courts within the Sixth Circuit, and affecting the litigating posture of petitioner in any future antitrust cases arising out of the pricing conduct the Commission condemned.[8] Third, if the court's decision stands, the Commission's repudiation of the grounds upon which it was founded would produce an unseemly conflict, in the same case, between the decisions of the reviewing court and the agency reviewed. These factors support exercise of this Court's certiorari jurisdiction to vacate the judgment below under the established practice for dealing with cases that become moot while on their way to this

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[8]Under Section 5(a) of the Clayton Act, 15 U.S.C. (Supp. V) 16(a), no collateral estopped effect may "be given to any finding made by the Federal Trade Commission under the antitrust laws or under [Section 5 of the Federal Trade Commission Act,] which could give rise to a claim for relief under the antitrust laws." This provision, however, does not foreclose claims that the Commission's findings have a prima facie effect under the Clayton Act. Two circuits recognize such an effect. *Purex Corp.* v. *Procter & Gamble Co.*, 453 F.2d 288 (9th Cir. 1971), cert. denied, 405 U.S. 1065 (1972); *Farmington Dowel Products Co.* v. *Forester Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969). See H.R. Rep. No. 96-874, 96th Cong., 2d Sess. 4-5 (1980). The Commission takes no position as to the soundness of these cases.

Court. *United States* v. *Munsingwear,* 340 U.S. 36 (1950); *Great Western Sugar Co.* v. *Nelson,* 442 U.S. 92 (1979).*

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to that court with directions that it be remanded to the Commission for entry of the agreed cease-and-desist order.

Respectfully submitted.

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Solicitor General

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Federal Trade Commission

MAY 1983

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*In private litigation, some courts of appeals have said that they need not automatically vacate the judgment below if a case on appeal becomes moot by settlement. Instead, they simply dismiss the appeal. See *Ringsby Truck Lines, Inc.* v. *Western Conference of Teamsters,* 686 F.2d 720 (9th Cir. 1982); *Cover* v. *Schwartz,* 133 F.2d 541, 546-547 (2d Cir. 1942) cert. denied, 319 U.S. 748 (1943). This Court's dispositions of *Hammond Clock* and *J. Aron, supra,* indicate, however, that settlement is not invariably a bar to vacation of the judgment below. As shown above, in this case there are substantial reasons why the court of appeals' judgment should be vacated in the public interest.

*The Commission's General Counsel is recused from this case.

No. 83-307

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

KETCHIKAN PULP COMPANY,
Petitioner,

v.

REID BROTHERS LOGGING COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-307

KETCHIKAN PULP COMPANY,

Petitioner,

v.

REID BROTHERS LOGGING COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The petition for a writ of certiorari filed by Ketchikan Pulp Company ("KPC") is without merit and should be denied. KPC has incorporated by reference the arguments made in the petition for certiorari filed by its co-defendant in the same case, Alaska Lumber & Pulp Company ("ALP"), Cause No. 83-301 in this Court, and ALP similarly has incorporated KPC's arguments. Accordingly, Reid Brothers Logging Company ("Reid Brothers"), the respondent herein, submits this brief in opposition to be read together with its brief in opposition to the related petition. For the sake of clarity, this brief should be read first and respondent's brief in opposition to ALP's petition should be read second.[1]

[1] The following abbreviations are used herein: The petitioners' Joint Excerpt of Record in the court of appeals is cited as "ER" herein, the Supplemental Excerpt of Record as "SER," the repor-

STATEMENT OF THE CASE

This is a case, commenced eight and a half years ago, in which a relatively small private enforcement action exposed a massive conspiracy and monopolization which had operated successfully for many years in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). The complaint, filed by Reid Brothers on March 13, 1975 (ER 1-15), charged the defendants KPC and ALP with conspiring to restrain trade in, conspiring and attempting to monopolize, and actually monopolizing, the timber industry in Southeast Alaska.

The case was assigned to the late Hon. Morell E. Sharp, United States District Judge. Four subsequent suits of a similar nature (two by independent loggers and two by operators of small sawmills) were consolidated by Judge Sharp with the Reid Brothers action for discovery and pretrial purposes (CR 105, 112). The defendant pulp mill companies employed what has aptly been called the "stonewall defense" throughout the litigation. They resisted on every issue, filed motion after motion seeking to prevent the case from going to trial, and refused to concede facts even in the face of irrefutable evidence. Massive discovery was necessary. In 1978 the defendants filed a voluminous set of motions, including a motion to strike plaintiff's jury demand[2] and eleven summary judg-

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ter's transcript "RT," the district court clerk's record as "CR," trial exhibits as "Ex," and the district court's findings of fact as "FF." Evidentiary references are generally given to "ER" pages which summarize the evidence and contain specific citations to trial testimony and exhibits; in some instances references are made directly to the latter. The appendix to KPC's petition is cited as "KPC App." and that to ALP's petition as "ALP App."

[2] Defendants' motion to strike plaintiff's jury demand was accompanied by extensive arguments that the case must be tried to the

ment motions (seven of which sought partial or total summary judgment as to the Reid Brothers case). Judge Sharp denied all but one of these motions (partial summary judgment on the statute of limitations was granted on the damage claim of one of the other plaintiffs) and stated in his order of November 22, 1978 (SER 48, 52-53):

> The Court finds that there is sufficient evidence available that shows that defendants communicated with each other and participated in common practices so as to lay the groundwork for a reasonable inference of price stabilization. . . . There is evidence available from which one could reasonably infer that defendants entered into a comprehensive timber agreement benefitting both parties . . .

After the pretrial order was lodged (ER 45), defendants filed an additional battery of motions. (CR 407, 409, 435, 504.) By the spring of 1980, the Reid Brothers case had been pending for five years. Because of Judge Sharp's illness, the Alaska timber cases were transferred to the Hon. Barbara J. Rothstein, United States District Judge. (SER 62.) Judge Rothstein ruled on the defendants' motions (CR 468, 471, 527) and set the Reid Brothers case for trial on July 28, 1980. In all, the defendants filed and briefed sixteen pretrial motions seeking to avoid trial in whole or in part. The district court docket contains 1,044 entries. (ER 2454-92.)

The trial began on August 4, 1980, and continued through forty-one trial days until mid-November, 1980. Sixty persons testified in person or by deposition; 1,291 exhibits were admitted into evidence; and more than

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court. Later, when faced with a trial date the certainty of which depended upon the case being tried to the court, ALP reversed its field and demanded a jury. The invalidity of ALP's belated demand is discussed in the brief opposing its petition for certiorari.

6,000 pages of trial transcript were developed. At the court's direction extensive post-trial briefs and proposed findings were filed by all parties. On March 5, 1981, the district court rendered its oral decision, finding that Reid Brothers had sustained its burden of proof with respect to every material violation alleged in the pretrial order. Judge Rothstein stated (ER 2404-5):

> The Court believes that the proof in this case has overwhelmingly established that the defendant mills, both KPC and ALP, conspired to restrain trade and to monopolize the timber industry in Southeast Alaska. The Court feels that the evidence establishes that the two mills achieved monopoly power and exercised this power.

Two months later the court circulated draft findings and conclusions and invited comment by all counsel. After considering the parties' comments, the court entered thorough and detailed findings of fact and conclusions of law. (ER 2416-2449.) On June 22, 1980, more than six years after the action was commenced, judgment was entered for Reid Brothers and against KPC and ALP in the amount of $496,627, trebled to $1,489,881. (ER 2450.)

The pulp mill companies appealed to the Court of Appeals for the Ninth Circuit. That court affirmed on March 1, 1983, and, in the course of holding that the evidence fully supported the findings of petitioners' Sherman Act violations, remarked on the "overwhelming evidence of wrongdoing in this case." 699 F.2d 1292, 1297 n.4.

The defendants sought a rehearing by the court of appeals en banc. That petition was submitted to the full court and no judge requested a vote thereon. Accordingly, the petition for rehearing was denied. (KPC App. A-69.)

The four related Alaska timber cases were settled as to one defendant (KPC) after the Reid Brothers trial, and were settled as to the other defendant (ALP) after the Ninth Circuit's affirmance.

SUMMARY OF ARGUMENT

This summary condenses the responses to petitioners' arguments herein and in the companion petition, No. 83-301.

The defendants' argument that the district court and court of appeals found that they had conspired in violation of Sherman Act §§ 1 and 2 "based solely upon (1) a variety of legitimate business and personal contact, plus (2) similar but not consciously parallel conduct" is untenable. The conspiracy in fact was proved by abundant evidence both direct and circumstantial; it was carried out by a combination of explicit communications between the defendants and consciously interdependent action; and it employed a variety of methods of destroying competition. Standard antitrust conspiracy law was applied by the district court and the court of appeals.

The petitioners' argument over standards for "predatory pricing" is not even raised by the record. This is a conspiracy case, not a single-actor attempt-to-monopolize case such as those relied upon by defendants. As part of their conspiracy the defendant pulp mills bid preclusively on timber sales, each in its collusively-set "operating area," to keep out would-be competitors for logs. It was not necessary to allege or show any mathematical relationship between defendants' costs and the amounts of their bids where the bidding to exclude other mills was part and parcel of a horizontal conspiracy to restrain trade and monopolize.

The argument that KPC's offer to Reid Brothers was "better-than-competitive" is not only over a question of fact, unsuitable for review by this Court, but is utterly specious. The offer in fact was far worse than what respondent would have experienced in a market free of defendants' collusive trade restraints because it embodied a flat three-year price which deprived the seller of periodic price increases which, under competitive conditions, would have resulted from rising end product values. The court of appeals has correctly affirmed the district court's finding that, but for the defendants' antitrust violations, Reid Brothers would have logged the Muddy River No. 3 sale as a purchase logger selling to one or more buyers at prices fluctuating periodically with end product values.

The argument that the statute of limitations was not observed is plainly incorrect in light of the well-established rule that evidence predating the limitations period is admissible to show the origins and nature of the conspiracy. The defendants committed injury-causing acts within the limitations period, and plaintiff was properly awarded as damages the difference between what is actually experienced in its dealing with KPC and what it would have experienced but for the defendants' antitrust violations.

The defendant KPC expressly stipulated in open court to a bench trial of this case several weeks before the trial began. Both defendants had repeatedly moved to strike plaintiff's jury demand, requested a trial to the court even after the Reid Brothers case was designated to be tried separately, and even argued that a jury trial would deprive them of due process of law. The district court correctly ruled that ALP had not relied upon plaintiff's jury demand, which was withdrawn in order to obtain a

trial date under conditions of calendar congestion, and that both defendants had waived any claim to a trial by jury. The court of appeals has correctly affirmed on the basis of established law that the right to a trial by jury is not absolute but may be waived expressly or by conduct.

ARGUMENT

A. Standard Of Review

The petition of KPC, like that of ALP, consists largely of attempts to re-argue fact issues which were resolved against defendants in the district court. The applicable standard of review is set forth in Fed. R. Civ. P. 52(a), which provides:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

The court of appeals, affirming "[a]fter a careful review of the extensive record", 699 F.2d at 1295, has found the district court's findings of conspiracy, monopolization, and damages to be fully supported by the evidence, stating, *inter alia:*

> The refusal of the defendants to compete for timber sales offered by the USFS or logs marketed by independent loggers was part of a general scheme to reduce the costs of timber acquisition and thereby increase the spread between costs to the defendants and the prices received for end products.
>
> * * *
>
> This division of the market, sustained by an uninterrupted pattern of communications up through 1975, resulted in a remarkable record of bidding restraint by the defendants.
>
> * * *

The evidence also supports the district court's finding that the defendant blocked the establishment of competing mill facilities by using covertly controlled corporations ("fronts") to bid preclusively on USFS timber sales.

* * *

Finally, the evidence shows that KPC and ALP conspired to pay artificially low prices to loggers. By calculating payments to loggers on the basis of the loggers' costs rather than the value of the logs, ALP and KPC created a network of "captive" loggers heavily indebted to the defendants. With a drop of the executioner's sword, the defendants could cut off a logger's financing, force the logger out of business, and acquire the company or its assets.

* * *

We find that this unlawful agreement constituted a restraint on interstate and foreign commerce in violation of § 1 of the Sherman Act.

* * *

The evidence supports the finding of the district court that the defendants violated § 2 of the Sherman Act.

* * *

The district court correctly defined the relevant geographic and product markets and found that the defendants combined to possess over a 90 percent share in those markets. The above-cited evidence shows the existence of a conspiracy based on an intent to monopolize and the occurrence of several overt acts in furtherance of that conspiracy.

* * *

> The finding of the district court that KPC unlawfully imposed a multi-year, non-negotiable contract on RBLC for the sale of the Muddy River logs is substantially supported by the evidence.
>
> * * *
>
> Furthermore, the evidence also supports the critical finding of the district court that contractual log prices between a purchase logger and a log buyer would have been renegotiated at least annually in an unrestrained market.

699 F.2d at 1296, 1297, 1298, 1299, 1300, 1301.

The petitioners' argument here that the district court "mechanically adopted" the findings proposed by respondent is untenable. During the half-year between the closing of the evidentiary record and the entry of the findings, the district judge considered over 2,000 pages in post-trial submittals, as well as the trial record itself. The findings clearly represent "the district court's own deliberations," *AMF Inc.* v. *Sleekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979). They contain many paragraphs not based upon any party's submittals. Comparison of plaintiff's proposed findings and those entered by the court (CR 841 and ER 2416-49) reflects the numerous changes made by the trial judge from the findings proposed by respondent.

B. The Parties

Reid Brothers, an Alaska corporation, was formed in 1946 by five members of the Reid family, residents of Petersburg, Alaska. From and after 1968, the sole owners were Glenn and Martha Reid. (FF III.A, ER 2417). Reid Brothers was engaged in business as an independent logger. Its reputation for ability and integrity was of the highest. 699 F.2d 1301, 1302 n.15. Defendant KPC, a

Washington corporation, was formed as a joint subsidiary of lumber, pulp, and rayon manufacturers. Its parents at various times were American Viscose Corporation, Puget Sound Pulp and Timber Company, Georgia Pacific Company ("G-P"), FMC Corporation ("FMC"), and Louisiana-Pacific Corporation ("L-P"). KPC commenced its pulp mill operation in Southeast Alaska in 1954. Defendant ALP was formed as a subsidiary of Alaska Pulp Company, Ltd. ("APC"), a Japanese-owned corporation, which in turn was and is held by numerous companies engaged in rayon manufacture, pulp and paper manufacture, banking, trading, and other commercial and industrial activities. (FF III.C, ER 2418.) ALP commenced its saw mill operation in Southeast Alaska in 1954, when it acquired Wrangell Lumber Company ("WLC"), and began its pulp mill operation in 1959.

C. History Of Defendants KPC And ALP

KPC and ALP acquired their 50-year allotments from the Forest Service in 1951 and 1957, respectively. (ER 635.) It was the intention of the Forest Service that both defendant mills would comply with all federal laws and regulations, including the antitrust laws. (ER 635.) It was expected that the two would compete for independent timber sales, and for logs purchased from independent loggers, to fill out their log requirements. (ER 650.) The defendants have not claimed to be exempt from the antitrust laws, and it is clear as a matter of law that they could not be.

The defendants functioned primarily as suppliers to the entities which owned them. Because of the predominance of non-arm's-length sales to affiliated entities the court found it was impossible to determine accurately the values of the end products to the defendant mills. (FF V.B.1-3.)

KPC sold approximately 80% of the pulp which it manufactured to its parent, FMC (ER 635.) FMC received substantial price discounts. Moreover, both of KPC's parents received fees and commissions which, although deducted as "expenses," really amounted to draws and were kept approximately equal by periodic adjustments. (FF V.B.1-3; ER 635.) KPC's operations generated large amounts of cash and were profitable even after the millions in fees and commissions paid to its parents. KPC's profits in the first half of 1973 increased by 165% over the 1972 rate, and the company forecast a cash buildup from $768,000 at June 30, 1973, to $17,587,000 at June 30, 1974. (ER 636.) During the week of September 10, 1973—the same week KPC shut down Reid Brothers' logging operations—executives of L-P and FMC met to discuss KPC's enormous profitability. (Ex. 1003, SER 207.) In January, 1975, L-P valued KPC "in the range of $275,000,000" while its cost basis in KPC was only $6,000,000 for one-half ownership. (Ex. 934, SER 224.)

ALP and its related sawmills (WLC and Alaska Wood Products) similarly functioned as suppliers to ALP's parent company, APC, which in turn resold ALP's product to its shareholders. APC in Tokyo determined the prices at which logs were transferred between ALP's Woods Division and its Mill Division. (ER 637.) APC purchased all of the pulp produced by ALP and set the price for it. (ER 637.) APC also purchased all lumber products produced by the WLC and AWP sawmills. (ER 637.) APC in turn resold the pulp and lumber products to its shareholders, which then used or resold the products to users in Japan. (ER 637.) The profits of the shareholders on resale were not made available. (ER 637.)

In 1972, G-P considered trying to acquire ALP, and Harry Merlo, then vice-president of G-P, wrote after meeting with Hisaya Hiromatsu, one of ALP's top officials (ER 639):

> The owners of APC have really never paid a fair price for their dissolving pulp so the true financial picture of Alaska Pulp Company reflects this subsidizing.

Similarly, KPC's timber manager, Mr. Brooks, wrote that "the Japanese operations are gong to be manipulated so that any profit therefrom is taken in Japan and there will be little or no taxes paid to the State of Alaska or the Federal Government." (ER 639.) As a result of such manipulations, ALP generally showed paper losses during most of the years to 1973, but the figures did not represent economic reality. (ER 639-40.) In 1973-74, when Reid Brothers was operating the Muddy River No. 3 timber sale, and despite the understatement caused by the bookkeeping devices described above, ALP's records showed substantial profits. (ER 640.)

The Forest Service concluded that it was unable to determine the true value of end products manufactured by the defendants and sold in Japan. (ER 638.)

D. The Defendants' Conspiracy Was Pervasive, And Must Be Viewed As A Whole

The district court has found that KPC and ALP engaged in a conspiracy

> . . . the purposes and the actual effects of which have been: to restrict and eliminate competition in all phases of the timber industry in Southeast Alaska; to refrain concertedly from competing against each other for timber or logs; to keep would-be competitors out of Southeast Alaska by cutting off their timber supplies through preclusive bidding and other means; to eliminate mill competition by acquir-

> ing ownership or control of the sawmills in Southeast Alaska, while expanding their own operations; to control and manipulate the log supply to the few surviving mills; to pay artificially low prices to independent loggers for logs and logging services; to eliminate purchase loggers from the field; and to attain and exercise monopoly power, *i.e.*, the power to set prices and exclude competition, in the timber industry in Southeast Alaska.

(FF VI.)

The court of appeals has held in this regard, 699 F.2d at 1298, n.7:

> The defendants' challenges to the district court's conclusion that a § 1 conspiracy existed are totally without merit. The defendants' attempts to isolate and attack particular portions of the district court's opinion not only ignore the weight of the evidence, but display an apparent inability to interpret certain portions of the district court order. . . .

The district court further found (KPC App. A-43) that

> [e]ach part of the defendants' combination and conspiracy interlocked with every other part, and was aimed at the same goal of restricting and eliminating competition in the timber industry in Southeast Alaska.

That finding is clearly compelled by the evidence. Each part of the defendants' combination and conspiracy reinforced the other parts—for example, defendants' exclusion of other mills eliminated competition for logs and logging services, which facilitated defendants' control of loggers through their system of administered prices and debt accounts, which brought about the elimination of independent loggers, which in turn extended defendants' monopoly power and made it impossible for other mills to compete in Southeast Alaska, and so on—and each part

was aimed at the same goal of restricting and eliminating competition.

The law requires that every conspiracy be judged as a whole. *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U.S. 690, 699 (1962); *Beltz Travel Service* v. *Int'l Air Transport Ass'n*, 620 F.2d at 1366-67 (9th Cir. 1980). Thus, where a plaintiff is injured by one facet of a multifaceted conspiracy he is entitled to damages regardless of whether the other facets of the defendants' collusion had any economic impact on him. *Washington State Bowling Proprietors Ass'n* v. *Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir. 1966), *cert. denied*, 384 U.S. 963 (1966). It does not matter that individual acts, conduct, agreements or practices might otherwise be lawful if viewed in isolation; their vice is their use in the aggregate to achieve the unlawful purpose. *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964); *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. denied*, 377 U.S. 993 (1964). Otherwise innocent acts are unlawful when they are part of the sum of acts relied upon to accomplish an unlawful objective. *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946).

E. Standard Of Proof In Sherman Act Cases

The Sherman Act is a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4-5 (1958). The statute is designed to sweep away all appreciable obstructions so that the policy of free trade may be effectively achieved. *Greyhound Computer Corp.* v. *Int'l Business Machines Corp.*, 559 F.2d 488, 504 n.37 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978). To carry out this mandate for open competition, Congress established the private treble-damage action as a principal means of enforcing the Sher-

man Act for the public benefit as well as to compensate injured parties. *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965); *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U.S. 100, 130-31 (1969); *Olympic Refining Co.* v. *Carter*, 332 F.2d 260, 264 (9th Cir. 1964), *cert. denied*, 379 U.S. 900.

A combination or conspiracy is formed within the meaning of Section 1 of the Sherman Act if the participants have a common objective to effect an unlawful purpose, and there is some agreement or course of conduct undertaken by the participants to accomplish the objective. *E.g.*, *Kiefer-Stewart Co.* v. *Joseph Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Interstate Circuit* v. *United States*, 306 U.S. 208 (1939); *Esco Corp.* v. *United States*, 340 F.2d 1000 (9th Cir. 1965). It is not necessary to find an express agreement in order to find a conspiracy. A tacit understanding is enough. It is sufficient that concert of action was contemplated and the defendants conformed to the arrangement. *United States* v. *Paramount Pictures*, 334 U.S. 131, 142 (1948); *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966); *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600 (1914); *Pacific Coast Agr. Export Ass'n* v. *Sunkist Growers, Inc.*, 526 F.2d 1196, 1203 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). This rule was applied in *United States* v. *Champion International Corp.*, 557 F.2d 1270, 1272-73 (9th Cir. 1977), *cert. denied*, 434 U.S. 938, where the court affirmed the criminal convictions under the Sherman Act of Oregon lumber firms which had conspired to eliminate competition in bidding for timber offered for sale by the U.S. Forest Service.

Whether the defendants' agreement is express or implied, it is well established that either circumstantial or direct evidence can be sufficient to prove it. The essential

combination or conspiracy in violation of the Sherman Act may be inferred from a course of conduct of dealing or other circumstances as well as from an exchange of words. *American Tobacco Co.* v. *United States, supra,* 328 U.S. 781, 809-810 (1946); *United States* v. *Masonite Corp.*, 316 U.S. 265 (1942); *Interstate Circuit* v. *United States, supra,* 306 U.S. 208 (1939). Most antitrust conspiracies are proved entirely or in large part by inferences drawn from the defendants' conduct. *Esco Corp.* v. *United States, supra,* 340 F.2d at 1007 (9th Cir. 1965); *Girardi* v. *Gates Rubber Co. Sales Div., Inc.*, 325 F.2d 196, 200 (9th Cir. 1963).

The evidence here was both direct and circumstantial. It showed the defendants' combination and conspiracy in restraint of trade, and monopolization, so conclusively that if this were a criminal case they would surely have been convicted. Their trade restraint was destructive in its methods and pervasive in its effects.

F. The Pattern Of Collusive Communications And Joint Projects Between KPC And ALP; Petitioners' Arguments Over The Statute Of Limitations Are Without Merit

The court has found that "[d]espite their position as competitors, ALP and KPC maintained a pattern of communication concerning their respective business operations, and of entering joint projects in procurement and marketing." (FF VII.2.) The evidence of systematic communication and cooperation between competitors, summarized in sixteen findings, provides the factual setting in which the remaining evidence of conspiracy should be viewed.[3]

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[3] The courts recognize that collusive market control can be more readily accomplished in a market dominated by only a few competitors. *E.g., United States* v. *Container Corp. of America*, 393 U.S.

Defendants' argument that the evidence included events predating the statute of limitations period, as well as events within the period, is misplaced. It is well settled that plaintiff is entitled to plead and prove the whole conspiracy, including its genesis and development before the four-year damage period. *E.g.*, *Continental Ore Co. v. Union Carbide Corp.*, *supra*, 370 U.S. 690, 709-710 (1962). Similarly, in a Section 2 case the court ordinarily receives evidence showing the history of the monopolization. *E.g.*, *Baush Machine Tool Co. v. Aluminum Co. of America*, 72 F.2d 236, 239 (2d Cir. 1934), *cert. denied*, 293 U.S. 589.

KPC's collusion with ALP began when the latter was first preparing to start operating its pulp mill. In 1959, KPC sent ALP confidential information on prices it intended to pay to loggers for logs. (ER 642-43; Ex. 498, SER 100.) An ALP memorandum of April 6, 1959, stated (ER 643):

> These prices were supplied by an employee of Ketchikan Pulp Co. and should be held in the strictest confidence, if we are to maintain our contacts for this type of price information.

Over the ensuing years, the defendants engaged in many joint projects. Illustrative are a fraudulent pricing arrangement on inter-defendant sales of cedar logs whereby they used a dual invoicing system to conceal the true price from the Forest Service and the public in order to depress stumpage values (ER 645-47; FF VII.13, ER 2429); a joint venture to share, and avoid bidding on, the timber from the best spruce area in the region (ER 644); and KPC's giving "preference" to ALP on its spruce and

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333 (1969); *Gainesville Utilities Dep't v. Florida Power and Light Co.*, 573 F.2d 292 (5th Cir. 1978), *cert. denied*, 439 U.S. 913.

cedar sales (ER 644.) Over the years KCP and ALP exchanged information on independent timber sales, log supply, stumpage rates, towing rates, wage levels, log production, allotment reinventories, round log exports, the possible entry of new mill competitors, and other subjects.

G. The Defendants Concertedly Refused To Compete Against Each Other For Timber Or Logs, And Divided The Market By Agreement

Judge Sharp noted in denying the summary judgment motions that "[d]efendants' territorial division and their cooperation in the cedar export market show that each defendant benefited from the other's actions." (SER 53.) Judge Rothstein following trial found (FF VIII.B.1-3, emphasis added):

> 1. In a competitive marketplace, KPC and ALP, faced with this chronic shortage and an ongoing concern over supply, would have competed vigorously for independent timber sales and for logs produced by independent loggers. Instead, *the defendants refused to compete against each other for independent sales or for logs throughout the period 1959-1975.*
>
> 2. The defendants' motives for refusing to compete were to minimize costs, to avoid paying competitive stumpage prices which could lead to competitive prices to loggers for logs, and *to avoid paying competitive prices* which could lead to reappraisal of their long-term allotment prices at higher levels.
>
> 3. The said course of conduct by the defendants was *deliberate and interdependent. Each defendant refrained from competing against the other for timber sales and logs in reliance upon the other's reciprocal refusal to compete; competition inaugurated by either defendant would have required the other to act competitively as well in order to insure a supply.*

Throughout the period 1959-75, KPC and ALP were chronically short of timber. They were also at times acutely short of logs. (ER 650-54.) While both defendants needed more and more timber from outside their allotments, they were able to obtain less and less. (ER 654.) Had they behaved competitively rather than collusively, KPC and ALP would have competed vigorously for independent timber sales and for logs produced by independent loggers. Instead, they collusively refused to compete against each other throughout the period 1959-75. (ER 655-67, 1804-15.)

When ALP entered the market, KPC pulled back in areas where it had traditionally procured timber, and the two pulp companies thereafter confined themselves generally to mutually-observed "operating areas," thus avoiding competition. (ER 655-659.) KPC did not normally bid for timber within ALP's area once ALP entered the picture. (ER 656.) The documents confirm that each defendant would refrain from bidding *because* a sale was in the other's operating area. (*E.g.*, ER 656-7, Ex. 447.)

Even as the timber shortage grew more severe, KPC persisted in avoiding competition by staying out of ALP's operating area, and vice versa. (ER 657.) A remarkable confirmation of the defendants' collusive division of the market is set forth in Exhibit 361 (SER 220), a 1974 confidential memorandum by Mr. Finney, KPC's timber manager in the mid-70's, to Mr. Murdey, the company's vice president. Finney worked up a proposal whereby the existing division of territory between ALP and KPC would be modified. (ER 658.) It is a striking fact that in considering this change KPC did not discuss plunging into competition with ALP, but rather wrote up a proposal to modify, through agreement with its competitor, an existing collusive division of the market. (ER 658-659.)

Over the period 1959-75, hundreds of millions of board feet of valuable timber went to each defendant with no competition whatever from the other. (ER 660-67.) The record of bidding on independent timber sales reveals the unmistakable pattern of the defendants' collusion. (ER 664-6, 1811-12.)

Defendants' refusal to compete embraced the procurement of both cut logs and standing timber. Although loggers and logs were much in demand (ER 650-54, 666, 741-49, 1850-54), neither defendant ever made an offer to buy logs from a logger which it understood was selling logs to the other. (ER 666.)[4] The defendants knew their refusal to compete resulted in the loggers receiving non-compensatory prices. Mr. Brooks wrote to KPC's president in 1969 (ER 667):

> On the other hand, we are deterred from establishing a realistic log price by our fear that it will be reflected in Forest Service stumpage rates. . . .

On August 21, 1972, ALP wrote in the Minami report (Ex. 692, SER 169) that the log price "has been and is inappropriate." The log prices were not only "inappropriate" and less than "realistic," they were far less during the damage years than unrestrained market prices would have been, and this was a direct result of the defendants' antitrust violations.

Defendants' concerted allocation of the market, constituting one part of their conspiracy, was a violation of

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[4] ALP's oral engagement of Reid Brothers to do *contract* logging at a difficult site on its allotment at Zarembo Island was not an exception to defendants' refusal to compete. Plaintiff logged briefly at Zarembo and then ceased; at ALP's prices, four other loggers were also unable to log economically at that location. (ER 1813, n.5; RT 10:181-83.)

Sherman Act § 1. Concerted division of customers, territories, or markets is unlawful *per se. United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972); *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1 (1958); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951). Similarly, agreements or understanding of competitors not to compete for customers are unlawful *per se. United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir. 1961). Concerted allocation of markets by purchasers of raw materials are equally unlawful as concerted allocation of customers by sellers of a commodity. *American Tobacco Co.* v. *United States, supra*, 328 U.S. 781 (1946).

H. The Defendants Concertedly Kept Outside Mills From Establishing Competitive Facilities By Cutting Off Their Timber Supply Through Preclusive Bidding And Other Means

Throughout the 1960's and early 1970's, the Forest Service actively encouraged the establishment of independent sawmills and veneer (plywood) mills in Southeast Alaska, that is, facilities which would be independent of and in competition with defendants KPC and ALP. (ER 668.) However, ALP and KPC concertedly prevented the would-be entrants from establishing competitive mills. While the defendants collusively refused to bid against each other, each relied on the other to bid preclusively against outsiders in its own "operating area," thus excluding competition from the entire Tongass Forest. (ER 668-76; FF IX. 1-13.) The associate chief of the Forest Service reported that "[t]he two established pulp companies have bid preclusively to keep out western Washington and Colummbia River plywood mills." (ER 671.) By this means the defendants blocked the efforts of several veneer and plywood companies to

enter the field; none was able to obtain a timber supply. (ER 673.)

Sawmills also tried to establish competing facilities. Regarding a proposed new sawmill on Annette Island, Mr. Brooks wrote to KPC's president (ER 674):

> Once in the area they no doubt plan simply to outbid everyone for enough logs to supply the mill which they can probably do, unless a combination effort by the local groups run them out.

In 1969 G-P executive Schmidbauer wrote to KPC Timber Manager Finney that "we are going to have problems making up our minds on how best to keep competition out . . ." (ER 675.) Three KPC executives wrote in 1970 concerning KPC's "preventing any potential bidder from obtaining additional sales to support a mill in the area." Mr. Merlo, their superior, replied stating his agreement with that objective. (ER 675-76.)

Defendants' concerted efforts to exclude competition were successful. (FF IX. 13; ER 668-76.)

I. The Single-Actor "Predatory Pricing" Cases Cited By Petitioners Are Not In Point

Defendants now argue that their preclusive bidding practices could only be probative if they had bid at levels which would make their purchase of timber result in a net dollar loss to them, *i.e.*, below marginal costs, citing such cases as *Janich Bros. Inc.* v. *American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), and *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1976). The argument is totally misplaced. *Janich* and *Hanson* and other decisions of a like nature were limited attempt-to-monopolize cases which dealt with predatory pricing by a single actor; no allegations of concerted activity were involved. This is a conspiracy case, as was *American Tobacco Co.* v. *United*

States, supra, 328 U.S. 781 (1946), where this Court affirmed the criminal conviction under the Sherman Act on the basis, *inter alia,* of defendants' having bid on tobacco crops for the purpose of excluding competing cigarette manufacturers from access to raw material. The Court held that it made no difference whether the particular means employed were legal or illegal in themselves, because they became unlawful when employed as part of defendants' plan "to exclude actual or potential competition." *Id.* at 809. The Ninth Circuit in *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1035 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 57 (1982) has held that "to establish predatory pricing a plaintiff must prove that the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power," but the holding is simply irrelevant to the case at bar. *Inglis* too was a single-actor attempt-to-monopolize case. Here, by contrast, the allegations and proof were of conspiracy between the two pulp mill companies which dominated the market. There were neither allegations nor findings concerning the relationship of defendants' collusive exclusionary bidding practices to their costs, and none were necessary in view of the horizontal conspiracy to fix prices and exclude competitors which was amply proved by the evidence.

J. The Defendants Further Eliminated Mill Competition By Systematically Acquiring Ownership Or Control Of The Sawmills In Southeast Alaska

While concertedly excluding would-be entrants, KPC and ALP further eliminated mill competition by acquiring ownership or control of every major sawmill in Southeast Alaska. (FF X.A.1, ER 2435-6). The defendants' acquisi-

tion of other mills was part and parcel of their concerted bid-rigging and allocation of the market. Time after time, they deliberately froze the would-be competitor out of a log supply; then they acquired or took control of its facilities. *See* FF X.A.1-28, KPC App. A-53-7.

The would-be competitors which were unlawfully eliminated or controlled by the conspirators included Alaska Prince (to which Reid Brothers had been selling logs), Ketchikan Spruce Mills, Schnabel Lumber Company, Ed Head, Alaska Forest Products, and Alaska Wood Products. (FF X.A.1-X.B.3.) The destruction of Alaska Prince typified petitioners' methods. 699 F.2d 1297.

K. Pursuant To Their Conspiracy Defendants Deliberately Paid Artificially Low Prices To Loggers For Logs, And Eliminated Purchase Loggers From The Field; Legal Standards Applicable To Price-Fixing

The district court found that pursuant to their conspiracy the defendants paid artificially low prices to loggers for logs, and eliminated purchase loggers from the field. (FF XII.A.1-5.) The defendants paid only *administered* prices for logs—not free market prices. The prices were based on defendants' estimates of loggers' operating costs, not on log market values, and were calculated to keep loggers under the mills' control. The court has described these practices in FF XII.A.1-3 (KPC App. A-60.)

The defendants' artificial pricing system was collusive. (ER 713-730.) Each pulp mill could pay artificially low prices only on the basis that the other would reciprocally do the same. In refusing to compete for logs, each acted contrary to what its economic interest would have dictated had it behaved independently. Each could refrain from offering prices based on supply and demand only through their agreement not to compete against each

other and to exclude others who threatened to compete. The district court found (FF XII.A.4-5):

> 4. The defendants' systematic restraint of prices was interdependent. Each could, and did, impose artificially low prices upon loggers only on the basis that the other would do the same.
>
> 5. Had either defendant commenced to pay competitive log prices, the other would have been compelled to follow suit; but that did not occur.

Under the Sherman Act any combination or conspiracy which has the effect of raising, depressing, fixing, pegging or stabilizing the price of a product or service is illegal *per se*. It is not necessary that the participants in the conspiracy establish prices at specifically agreed levels. *Northern Pacific Ry. Co.* v. *United States*, *supra*, 356 U.S. 1, 5 (1958); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927). Price-fixing is equally unlawful whether it is direct or indirect, and whether it involves specific prices or only general agreement to raise, depress, or otherwise impede the actions of a free market. *United States* v. *General Motors*, 384 U.S. 127 (1966). Any combination which tampers with price structures constitutes an unlawful activity. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 222 (1940).

Combinations and conspiracies which have the effect of depressing, fixing or stabilizing the prices at which products are *purchased* are just as illegal as those affecting prices at which products are sold. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948); *Swift & Co.* v. *United States*, 196 U.S. 375 (1905); *American Tobacco Co.* v. *United States*, *supra*, 328 U.S. 781 (1946).

Here, the evidence shows overwhelmingly the correctness of the court's findings of price-fixing.

KPC deliberately paid loggers less than their expected costs, and then selectively made up the difference through "advances," keeping the loggers in debt. KPC's timber manager reported in 1967 (SER 124):

> [T]he independent logger cannot survive on our market price unless he has a very exceptional logging show and these are rapidly disappearing.

KPC did not change its log price for about ten years. (ER 714.) In 1969 its timber manager wrote to G-P (SER 140):

> Our published log prices are as follows but the fact of the matter is that few, if any, loggers could survive at these prices and we use all sorts of subterfuges to cover their cost of production, including charging off part of their mortgage accounts as we go along.

This program continued through the time covered by the evidence. (ER 715-726.)

ALP's log procurement prices, like those of KPC, were artificially low. The Minami Report, a detailed two-volume "Survey Report on ALP Woods Operations" issued in August of 1972, stated (in ALP's translation from the Japanese original, ER 715, SER 169):

> Acquisition of logs is made almost in all cases by the hands of contractors in the national lands. . . .
>
> [T]he contract price has been and is inappropriate and the deficit owing to this has been covered with growing advance money and, to make matters worse, new contracts for the following year have been made with rents [debts] not completely collected.

The report also noted that the prices were sometimes set at low levels to inspire "the loggers' effort" or because

ALP "consider[ed] it better to force them [to] continue operation at the low cost as a warning to other loggers." (SER 176-77.)

ALP, like KPC, deliberately kept prices below known logging costs. (ER 716-719.) The defendants' system of depressed prices resulted in the loggers accumulating massive debts. During the years 1968-73 KPC wrote off more than $3,000,000 in logger debts. (Ex. 1187.) As of September, 1973, ALP's total investment in loggers amounted to over $12.5 million; of that total, several million dollars represented operating loans made because prices were not covering the loggers' operating costs. (ER 718-19.)

KPC and ALP treated the logger bad debts as additional costs of procurement, in lieu of higher prices. (SER 132; ER 719: RT 12:15, 16.)

The defendants' use of non-price subsidies, debt forgiveness, and the like to keep selected loggers functioning was at KPC's or ALP's sole discretion. (ER 719-23.) Each defendant was aware of the other's use of administered prices. Mr. Brooks, for example, "surmised" that ALP was using essentially the same method as KPC did of paying prices below loggers' costs and then selectively forgiving debt afterward. (ER 723.)

One purpose of the concerted price restraint was to minimize procurement costs. Another was to avoid the creation of statistics which could increase stumpage prices. (ER 723.) In a letter to KPC's president, Mr. Brooks wrote (ER 724):

> [W]e are deterred from establishing a realistic log price by our fear that it will be reflected in Forest Service stumpage rates . . .

A further purpose was to enhance defendants' control of the industry. Neither defendant would allow a logger indebted to it to sell logs to another mill. (ER 724.) Defendants' below-cost pricing allowed them to control loggers by threatening to foreclose or cut off financing. (ER 724-725.) The pulp mill's cutting off a logger's financing ordinarily meant he was out of business. (ER 724-26.) A G-P memo stated, concerning loggers buying timber sales (Ex. 944): "This should be stopped and only KPC should buy and decide which loggers will do the job."

The result of defendants' collusive administered prices was the elimination of independent loggers and their replacement with defendant-owned or controlled companies. (FF XII.B.1-3.) This change was deliberately carried out by KPC and ALP although both defendants conceded that independent loggers were more efficient than defendant-owned or managed companies, and produced logs more cheaply. (ER 726-727.) The effects of defendants' practices on purchase loggers were devastating. In the earlier years, there were many independent purchase loggers; in the later years, defendants obtained almost all their supply from contract loggers. (FF IV.14; ER 2422.) Faced with the destruction of competition for their products, loggers had to take whatever one of the defendants would pay. (ER 727.) As logging companies went under, the defendants acquired the companies themselves or their assets. (ER 728-29.)

K. The District Court And Court Of Appeals Applied Standard Conspiracy Law

The law has long recognized that a conspiracy in violation of the Sherman Act may be tacit or express, may be proved by circumstantial or direct evidence (or both), and may be inferred from conduct. *See* Section E, *supra*. The district court applied these standard rules in concluding

that the evidence "overwhelmingly" established defendants' violations. (ER 2404.) The defendants' arguments concerning a "new theory of conspiracy," "opportunity evidence," and "conscious parallelism" are specious. Interdependence of the conspirators' conduct—*i.e.*, the fact that each can continue to refrain from competing only on the basis that the others reciprocate—is a long-recognized feature of collusion. *E.g.*, *Interstate Circuit* v. *United States*, *supra*, 306 U.S. 208 (1939); *United States* v. *Champion International Corp.*, *supra*, 557 F.2d 1220 (9th Cir. 1977), *cert. denied*, 434 U.S. 938. This is not a mere "conscious parallelism" case and even if it were, the "plus" factors are so abundant that liability is clear.[5] The

[5] "Conscious parallelism" is defined as a situation in which two or more companies follow similar courses of conduct *without intercommunication*. 1 von Kalinowski, *Antitrust Laws and Trade Regulations*, § 6.01[3]. The "plus" factors held sufficient to make it actionable have included the showing of a complex yet identical set of responses, direct communication or an opportunity for it, or a set of circumstances which made each participant aware that it was in its interest to participate if all did, but adverse to its interest to participate if others did not. L. Sullivan, *Handbook of the Law of Antitrust*, pp. 317-318; *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971); *Bogosian* v. *Gulf Oil Co.*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). Where the circumstantial evidence goes beyond mere parallel behavior, and includes other factors which suggest collusion, the evidence is sufficient to warrant a finding of conspiracy. *See, e.g.*, *C-O Two Fire Equip. Co.* v. *United States*, 197 F.2d 489 (9th Cir.), *cert. denied*, 344 U.S. 892 (1952); *Milgram* v. *Loew's Inc.*, 192 F.2d 579 (3d Cir. 1951), *cert. denied*, 343 U.S. 929. Consciously parallel business behavior is always admissible as evidence of underlying agreement, combination or conspiracy, and the probative value of such evidence is to be determined by the trier of facts. *Theatre Enterprises Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 540, 541 (1954); *Standard Oil Company of California* v. *Moore*, 251 F.2d 188, 210, 211 (9th Cir. 1958); *Pittsburgh Plate Glass Co.* v. *United States*, 260 F.2d 397 (4th Cir. 1958).

cases on "social friendships" and "mere opportunity" are simply inapposite.[6] The defendants here conspired and monopolized through their actions and words in the timber industry—not through social conversations.

CONCLUSION

For the reasons stated above and in respondent's brief in opposition in Cause No. 83-301, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[6] In *American Tobacco Co. v. United States*, 328 U.S. 781, 793 (1946), the Court stated: "A friendly relationship within such a long established industry is, in itself, not only natural but commendable and beneficial *as long as it does not breed illegal activities*. Such a community of interest in any industry, however, provides a natural foundation for working policies and understandings favorable to the insiders and unfavorable to outsiders." (Emphasis added.)

83-307

[redacted]

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

KETCHIKAN PULP COMPANY
Petitioner,

vs.

REID BROTHERS LOGGING COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER, KETCHIKAN PULP COMPANY

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83-307

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In the Supreme Court

OF THE

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October Term, 1983

Ketchikan Pulp Company
Petitioner,

vs.

Reid Brothers Logging Company,
Respondent.

REPLY BRIEF OF PETITIONER, KETCHIKAN PULP COMPANY

A. Preliminary Statement

Respondent's brief in opposition to KPC's petition scarcely addresses the issues presented in that petition, which include: (1) whether a purely subjective, non cost-based standard can be used to determine the line between predatory and competitive prices or bids; (2) whether antitrust injury can be caused by a better-than-competitive price, with damages wholly unrelated to alleged antitrust misconduct; and (3) whether liability and damages can be based on evidence well outside the statute of limitations period. Consistent with respondent's approach in the courts below, respondent instead urges this Court that the allegation of an all-encompassing, amorphous conspiracy erases the need for legal standards or analysis.

KPC will focus on the few points raised by RBLC which relate to the questions presented in KPC's petition. As shown below, contrary to RBLC's contention, the lower courts do not and should not distinguish between single-firm and conspiracy cases in determining what standard

to apply to claims of p[redacted]ing or bidding. Accordingly, this Court is faced with the same issue of the applicable standard in this case as that presented in other petitions in this term in cases involving single-firm predatory pricing; in fact, the question is presented even more clearly in this case than in the others. KPC Petition at 12 n.7.

Moreover, respondent cannot continue to succeed with its persistent contention that once an all-inclusive conspiracy is alleged (however vague its contours), none of its component parts need be analyzed in order to determine whether the antitrust laws were violated or whether antitrust injury resulted. To accept respondent's contention would read the requirements of anticompetitive conduct and antitrust injury out of the antitrust laws. Respondent's approach buttresses the need for some direction by this Court as to the recurring legal questions presented for review.

B. Respondent Cannot Rebut the Immediate Need for This Court to Review the Ninth Circuit's Subjective Standard For Determining "Predatory" Bidding in This Case.

Respondent addresses the predatory bidding question in 2 of its 60 pages in response to the petitions of KPC and ALP. RBLC's Opposition to KPC's Petition at 22-23. Respondent does not deny the existence of a plain conflict between the circuits on the standards to be applied to claims of predatory bidding or pricing. Respondent does not deny the important and recurring nature of the question, and Respondent does not even take issue with the need for a cost-based test, rather than one based solely on subjective evidence of intent to prevail over competitors. Instead, Respondent surprisingly turns its back on the very Ninth Circuit test applied in this case and argues that *no* test of predation need be applied in a private case involving allegations of conspiracy to bid predatorily.

Respondent finds no support for this novel argument. No private case, including this one, has suggested that the test of predation in a conspiracy context should be different than the test in a single-actor context.

To begin with, the Ninth Circuit's decision in this case never so much as hints that a different test or analysis should be applied in a private case involving conspiracy claims and expressly refers to unilateral monopolization cases analyzing predatory pricing. Respondent refers to the test in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1035 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982) as "simply irrelevant to the case at bar" (Respondent's Opposition to KPC's Petition at 23), but the Ninth Circuit expressly looked to *Inglis* and other single-actor predatory bidding cases. App. A at A-8 n.5.

Respondent then states that "the single-actor predatory pricing cases cited by petitioners are not in point." RBLC's Opposition to KPC's Petition at 22. Respondent thereby implies that defendants cited only "single-actor" cases and that no cases involving conspiracy allegations have applied cost-based tests. Neither contention is correct. In fact, *every* court which has considered claims of conspiracy to engage in predatory pricing in a private antitrust case (including the Ninth Circuit in this case and cases cited in KPC's petition) has applied the same test as would apply in a "single-actor" case. *See, e.g., Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1259 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982) (affirming judgment n.o.v. for defendants where plaintiff alleged conspiracy to engage in predatory pricing but failed to allege that defendants priced below marginal cost; court held that absent evidence of pricing below marginal cost, pricing was not predatory); *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 853-54 & nn. 16-17 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981) (court assumed violation of predatory pricing for purposes of

appeal in case alleging conspiracy to price predatorily, and so did not decide issue of cost-based versus subjective test, but discussion of cost-based versus subjective test assumed same test would apply in conspiracy as in single-actor case); *Americana Industries, Inc. v. Wometco de Puerto Rico, Inc.*, 556 F.2d 625, 628 (1st Cir. 1977) (failure to allege persistent pricing below short-run, out-of-pocket costs substantially weakened "any possible claim of predatory conduct on the part of Wometco P.R. alone *or in conspiracy with* Wometco Enterprises" (emphasis added)).

RBLC mistakenly relies on *American Tobacco Co. v. United States,* 328 U.S. 781 (1946), as its lone authority for its novel argument. But *American Tobacco* was a *criminal* case brought by the United States, and therefore did not require proof of "antitrust injury." In the present case, RBLC as a private plaintiff is required to demonstrate that it has suffered an injury of the type which the antitrust laws were intended to remedy. 15 U.S.C. § 15; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977).

Even if RBLC could show a *violation* without cost-based evidence, it could never demonstrate antitrust injury without such evidence. A bidder who failed to outbid KPC or ALP because that bidder was not as cost-efficient is not injured by any antitrust violation. RBLC, a logger claiming a derivative injury from such a bid, is also not injured by any antitrust violation. Any antitrust injury caused by an alleged predatory price or bid[1]—or by a conspiracy to price or bid predatorily—ultimately turns on the level of

[1]RBLC plays a shell game when it tells this Court that its case does not involve claims of predatory bidding, after all, and is instead a price-fixing case. This is contrary to its own claim of injury, which is *not* based on an alleged fixed price, and is all the more absurd in light of the uncontroverted finding that the 1972 price offer by KPC was better-than-competitive. *See* KPC Petition at 7-9, 19-25.

the price or bid. There is no private antitrust harm until the price or bid crosses the line between competitive and predatory, and that line must be determined by some reference to a defendant's costs.[3]

In sum, respondent's position that no analysis is required of the level of bid or price is legally and logically unsupportable. The Ninth Circuit is correct in applying the *same* test in conspiracy and single-actor cases; the problem is that the purely subjective test adopted by the Ninth Circuit is erroneous and anticompetitive. This returns us to the question presented in KPC's petition, which urges that the test for predatory pricing or bidding must include some reference to a defendant's costs. That question should be resolved by this Court for all the reasons set forth in KPC's petition, none of which has been rebutted by respondent.

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[3]The distinction proposed by RBLC between single-actor and conspiracy claims of predatory bidding or pricing is particularly pernicious and anticompetitive when combined with the fact that RBLC presented no direct evidence of conspiracy to bid "predatorily", but rather urged that successful bids against "outsiders" were "parallel conduct" giving rise to an inference of conspiracy (despite the fact that each bid was consistent with the business interests of each defendant, faced with a recognized timber shortage). (See generally ALP's petition discussing the Ninth Circuit's erroneous standards for inferring conspiracy.) Now RBLC would close the circle by arguing that, because this is a "conspiracy" case, there is no need even to address the question whether any of those bids was so high as to be unprofitable for a defendant, i.e., whether any of those bids was predatory rather than competitive. The result is treble damages without proof either of conspiracy or of predatory conduct.

C. Respondent's Shotgun Approach to KPC's Petition for Certiorari Further Demonstrates the Need for This Court to Provide Guidance to Lower Courts in Private Antitrust Actions on the Remaining Questions Presented, Including: Causation; Statute of Limitations; Standards for Inferring Conspiracy; and Right to a Jury Trial

RBLC avoided resolution of all critical legal issues in the courts below by intoning the magic word "conspiracy" and using this Court's admonition in *Continental Ore v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) against improperly "compartmentalizing" evidence of conspiracy.

Indeed, the essence of Respondent's opposition to certiorari is that legal rules and analysis simply should not apply. But this Court's decision in *Union Carbide* cannot continue to support RBLC's erroneous propositions that (1) the aggregation of a plaintiff's claims can be greater than the sum of their parts, and (2) the parts of a broadly-stated antitrust claim cannot or should not be analyzed. Citing *Union Carbide's* admonition that plaintiffs be given the full benefit of their proof, another panel in the Ninth Circuit has properly concluded that "[t]here can be no synergistic result such as [plaintiff] claims from a number of acts none of which show causal antitrust injury to [plaintiff]." *California Computer Products v. IBM*, 613 F.2d 727, 746 (9th Cir. 1979). *Accord, City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 928 (2d Cir. 1981). Particularly in a complex case, the number of legal and evidentiary issues often requires the court to consider each instance of alleged anticompetitive conduct separately for "purposes of analytical clarity." 613 F.2d at 745. *Accord, Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 95 n.28 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

Thus, despite Respondent's "intoning the magic words 'unitary conspiracy' and 'totality of the evidence,'" *Zenith*

Radio Corp. v. Matsushita Electric Industrial Co., 513 F. Supp. 1100, 1169 (E.D. Pa. 1981), it is appropriate and indeed logically necessary to engage in careful analysis and to apply the law which Respondent has avoided in the courts below. To do otherwise is to turn the antitrust laws upside down, creating rules which defeat the very purposes of those laws.

As shown above, Respondent has urged that no test whatsoever be applied to RBLC's predatory bidding claim because it was all part of some huge, albeit internally inconsistent and ill-defined conspiracy. Respondent's approach to the causation question raised in KPC's petition is the same. Respondent urges that there need be no legal or rational basis for the finding that a two-year contract is illegal or anticompetitive, for it also was part of a conspiracy.[3] All relevant facts on the issue remain undisputed, including: RBLC never asked KPC or anyone else for annual renegotiations based on end-product values; RBLC in fact solicited multi-year offers; and RBLC received a better-than-competitive price offer from KPC *in 1972*. The only complaint RBLC had was that it wanted to protect

[3]Respondent cites no case supporting the conclusion that the multi-year contract at issue is anticompetitive. RBLC merely notes that duration may be significant in evaluating exclusive dealing contracts, but of course fails to add that it has never claimed and could not claim that the Muddy River #3 contract was an exclusive dealing or output contract. It plainly was not. This Court has long recognized the benefits of such a multi-year contract, which RBLC also recognized until hindsight showed that it made the wrong choice. *See generally Standard Oil Co. v. United States*, 337 U.S. 293, 306-07 (1949); *United States v. General Dynamics*, 415 U.S. 486, 499-502 (1973).

itself from a fall in the market for end products but instead the market rose dramatically and unexpectedly.[4]

The 1972 two-year price offer remains the only basis for the finding of injury to RBLC by the courts below. Respondent's brief cannot alter the embarrassing truth that the only thing wrong with that 1972 price was that the end-product market happened to go up rather than down. Such is not the stuff antitrust claims are made of.[5] Indeed, the courts below were simply persuaded to let RBLC use the antitrust laws to bet on the market with perfect hindsight. Of even greater concern under the antitrust laws, the courts below have thereby imposed on businesses the impossible duty of pricing with perfect prescience.

Respondent similarly asks this Court to ignore the statute of limitations because, after all, this is a con-

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[4]RBLC has the temerity to suggest to this Court, without citation, that KPC knew that significant increases were coming. RBLC's Opposition to ALP's Petition at 13. There is no indication anywhere in the record, nor did the courts below find, that KPC or ALP had any idea in 1972 that the short-lived boom would take place in 1973 and 1974 due to the Arab oil boycott. The evidence shows exactly the opposite: *no one* was aware of the coming increase when KPC made the later-contested offer in June 1972, and the jump in prices did not begin until 1973. E.R. 1133, 1630-31. The end-product prices in 1973 were more than double the prices KPC had projected in the fall of 1972. RT XVI:39-42. RBLC's suggestion that KPC knew in 1972 of the continuing increases is inexcusable in light of the unequivocal record on this point.

[5]The Court of Appeals has essentially eliminated causation as an element of a private action, has failed to attribute damages to allegedly actionable antitrust misconduct, and has ignored the rule that the value of an asset allegedly lost by virtue of an antitrust violation must be determined at the time of loss. These legal arguments are scarcely addressed by Respondent, let alone rebutted.

spiracy case. But for the reasons set forth in KPC's petition, this Court should take this opportunity to clarify that

> Plaintiffs cannot avoid the bar of the statute of limitations merely by characterizing each claim as part of a broad ongoing conspiracy continuing into the limitations period. *See Zenith, supra,* 401 U.S. at 338.

Argus v. Eastman Kodak Co., 1982-83 CCH Trade Cas. ¶ 65,024 at 70,696 (S.D.N.Y. 1982). The disregard of the statute of limitations by the Ninth Circuit in this case can only breed unfair results, decrease the ability of parties to estimate the settlement value of cases, and result in a proliferation of private antitrust cases based on claims that should have long been barred.

D. Conclusion

From the wrongful denial of a jury trial[6] through the decision of the Ninth Circuit, this antitrust action involving a complex industry crucial to Southeast Alaska has been marked by a complete failure of analysis and application of proper rules of law. Respondent's opposition to certiorari has taken liberty with both facts and the law, showing a cynical confidence in this Court's limited ability to hear cases on certiorari. We can only hope that RBLC's success in obfuscation and avoidance of the antitrust laws

[6] RBLC's argument that KPC consented to its waiver of a jury trial ignores the express requirement of Rules 38(d) and 39(a), Federal Rules of Civil Procedure, that such consent be unanimous and further ignores the record: KPC expressly conditioned its consent on effective, unanimous consent by all parties as required under the rules. CR 480.

will not result in the perpetration of Ninth Circuit rules which are patently anticompetitive.

Respectfully submitted,

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